1868

THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

M. C. Davis.

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

http://www.archive.org/details/casesonprivatein00dwyeiala

CASES

ON

PRIVATE INTERNATIONAL LAW.

BY

JOHN W. DWYER, LL. M.

INSTRUCTOR OF LAW IN THE DEPARTMENT OF LAW OF THE
UNIVERSITY OF MICHIGAN.

Published by
GEORGE WAHR,
ANN ARBOR.

Copyrighted by GEORGE WAHR,
1899.

T
D9788p
1899

Recd Moses Davis gift, 7-23-42

INLAND PRESS
PRINTERS & BINDERS
ANN ARBOR, MICH.

PREFATORY NOTICE.

The following collection of leading cases made by Mr. Dwyer has been carefully examined by me. I find that it covers, as fully as can be done in that way, the subject of my lectures on Private International Law; and I commend it to the most favorable consideration of Students and others.

OTTO KIRCHNER.

UNIVERSITY OF MICHIGAN,
June 9, 1899.

CONTENTS.

INTRODUCTORY.

PAGE.

THE NATURE OF THE SUBJECT—
Dicey Conflict of Laws 1

STATE DEFINED—
Cooley's Const. Lim. 16

INTERNATIONAL LAW A PART OF THE LAW OF THE LAND—
Cooley's Blackstone. 17

DOMICIL.

DEFINITION AND REQUISITES OF DOMICIL—
Hayes v. Hayes 20

DOMICILS OF ORIGIN AND OF CHOICE—
Udny v. Udny 23
In re Capdevielle 43

DOMICIL IN UNCIVILIZED COUNTRIES—
Dicey Conflict of Laws 54

REVERTER OF DOMICIL—
Bank v. Balcom 57

COMMERCIAL DOMICIL—
Dicey Conflict of Laws 64

DOMICIL OF MARRIED WOMEN—
Matter of Florance 71

DOMICIL OF INFANTS—
In re Vance 73

DOMICIL OF INSANE PERSONS—
Pittsfield v. Detroit 76

DOMICIL OF APPRENTICES—
Maddox v. The State 80

DOMICIL OF SAILORS—
Bangs v. Brewster 81

DOMICIL OF STUDENTS—
Vanderpoel v. O'Hanlon 85

DOMICIL FOR PURPOSES OF TAXATION—
Pullman Car Co. v. Penn.................................... 87
EVIDENCE OF DOMICIL—
Firth v. Firth.................................... 98

NATIONALITY.

CITIZENSHIP AND RIGHT OF EXPATRIATION—
Pequignot v. City of Detroit.................................... 104
ALIEN ENEMIES—
Clark v. Morey.................................... 111
The Venus.................................... 117

JURISDICTION AND CHOICE OF LAW.

IN GENERAL—
Dewitt v. Buchanan.................................... 133
Machado v. Fontes.................................... 135
PENAL LAWS—
Huntington v. Attrill.................................... 140
STATUS OF MARRIAGE—
Van Voorhis v. Brintnall.................................... 165
PROPERTY RIGHTS UNDER MARRIAGE—
Besse v. Pellochoux.................................... 181
FOREIGN DIVORCE—
Ditson v. Ditson.................................... 188
Roth v. Roth.................................... 210
LEGITIMACY—
Blythe v. Ayres.................................... 220
GUARDIANS—
In re Willie Rice.................................... 253
In re Stockman.................................... 255
Lamar v. Micou.................................... 266
Lamar v. Micou.................................... 286
ADMINISTRATION—
Wilkins v. Ellett.................................... 291
Johnson v. Powers.................................... 294
Reynolds v. McMullen.................................... 300
JUDGMENTS—
Hilton v. Guyot.................................... 310

CORPORATIONS—

Thompson v. Waters 367
Mutual Life Ins. Co. v. Spratley........ 386

IMMOVABLES—

Baum v. Birchall........ 399

MOVABLES—

Crapo v. Kelly........ 402
Barnett v. Kinney........ 412

ATTACHMENT AND SITUS OF A DEBT—

National Fire Ins. Co. v. Chambers........ 420

CONTRACTS—

Fisher v. Otis........ 447
Miller v. Wilson........ 456
Scudder v. Union National Bank 459
Liverpool Steam Co. v. Phenix Ins. Co 465

STATUTE OF FRAUDS—

Leroux v. Brown........ 493

TORTS—

Dennick v. Railroad Co........ 498

PROCEDURE—

Dicey Conflict of Laws........ 503

CASES REPORTED.

		PAGE.
Bangs v. Brewster	111 Mass. 382	81
Bank v. Balcom	35 Conn. 351	57
Barnett v. Kinney	147 U. S. 476	412
Baum v. Birchall	150 Pa. St. 164	399
Besse v. Pellochoux	73 Ill. 285	181
Blythe v. Ayres	96 Cal. 532	220
Clark v. Morey	10 Johns 69	111
Crapo v. Kelly	16 Wall 610	402
Dennick v. Railroad Co	103 U. S. 11	498
Dewitt v. Buchanan	54 Barb. 31	133
Ditson v. Ditson	4 R. I. 87	188

Firth v. Firth	50 N. J. Eq. 137	98
Fisher v. Otis	3 Wis. (Pinney's) 78	447
Hayes v. Hayes	74 Ill. 312	20
Hilton v. Guyot	159 U. S. 113	310
Huntington v. Attrill	146 U. S. 657	140
In re Capdevielle	2 H. & C. 985	43
In re Stockman	71 Mich. 180	255
In re Vance	92 Cal. 195	73
In re Willie Rice	42 Mich.528	253
Johnson v. Powers	139 U. S. 156	294
Lamar v. Micou	112 U. S. 452	266
Lamar v. Micou	114 U. S. 218	286
Leroux v. Brown	74 Eng. Com. Law 800	493
Liverp'l St'm Co. v. Phenix Ins. Co.	129 U. S. 397	465
Machado v. Fontes	2 L. R. Q. B. D. 231	135
Maddox v. The State	32 Ind. 111	80
Matter of Florance	54 Hun (N. Y.) 328	71
Miller v. Wilson	146 Ill. 523	456
Mutual Life Ins. Co. v. Spratley	172 U. S. 602	386
National Fire Ins. Co. v. Chambers	53 N. J. Eq. 468	420
Pequignot v. City of Detroit	16 Fed. Rep. 211	104
Pittsfield v. Detroit	53 Me. 442	76
Pullman Car Co. v. Penn	141 U. S. 18	87
Reynolds v. McMullen	55 Mich. 568	300
Roth v. Roth	104 Ill. 35	210
Scudder v. Union National Bank	91 U. S. 406	459
The Venus	8 Cr. 253	117
Thompson v. Waters	25 Mich. 214	367
Udny v. Udny	1 L. R. Scotch & Div. Apps. Cs. 441	23
Vanderpoel v. O'Hanlon	53 Iowa 246	85
Van Voorhis v. Brintnall	86 N. Y. 18	165
Wilkins v. Ellett	108 U. S. 256	291

INTRODUCTORY.

THE NATURE OF THE SUBJECT.

DICEY CONFLICT OF LAWS, P. 1.*

Most of the cases which occupy an English Court are in every respect of a purely English character; the parties are Englishmen, and the cause of action arises wholly in England, as where *A*, a London tradesman, sues *X*, a citizen of London, for the price of goods sold and delivered in London. When this is so, every act done, or alleged to be done, by either of the parties clearly depends for its legal character on the ordinary rules of English law.

Cases, however, frequently come before our Courts which contain some foreign element; the parties, one or both of them, may be of foreign nationality, as where an Italian sues a Frenchman for the price of goods sold and delivered at Liverpool; the cause of action, or ground of defence, may depend upon transactions taking place wholly or in part in a foreign country; as where *A* sues *X* for an assault at Paris, or on a contract made in France and broken in England, or where *X* pleads in his defence a discharge under the French bankruptcy law; the transactions, lastly, in question, though taking place wholly in England, may, in some way, have reference to the law or customs of a foreign country: this is so, for instance, when *A* wishes to enforce the trusts of a marriage settlement executed in England, but which on the face of it, or by implication, refers to French or Italian law.

Whenever a case containing any foreign element calls for decision, the judge before whom it is tried must, either expressly or tacitly, find an answer to, at least, two preliminary questions.

First Question.—Is the case before him one which any English Court has, according to the law of England, a right to determine?

The primary business of English tribunals is to adjudicate on transactions taking place in England between Englishmen, or at any rate between persons resident in England; or, briefly, to decide English disputes. There clearly may be matters taking place in a foreign country, or between foreigners, with which no English Court has, according to the law of England, any concern whatever; thus no Division of the High Court, and *a fortiori* no other English tribunal, will entertain an action for the recovery of land in any other country than England. When, therefore, a case coming before an English judge contains a foreign element, he must tacitly or expressly determine whether it is one on which he has a right to adjudicate. This first question is a question of jurisdiction (*forum*).

---

*This extract is inserted by permission of the publishers of the American Edition of "Dicey on the Conflict of Laws."

SECOND QUESTION.—What (assuming the question of jurisdiction to be answered affirmatively) is the body of law with reference to which the rights of the parties are according to the principles of the law of England to be determined?

Is the judge, that is to say, to apply to the matter in dispute (*e. g.*, the right of *A* to obtain damages from *X* for an assault at Paris) the ordinary rules of English law applicable to like transactions taking place between Englishmen in England, or must he, because of the "foreign element" in the case, apply to its decision the rules of some foreign law, *e. g.*, the provisions of French law as to assaults?

This second question is an inquiry not as to jurisdiction, but as to the choice of law (*lex*).

Each of these inquiries, be it noted, must be answered by any judge, English or foreign, in accordance with definite principles, and, by an English judge, sitting in an English Court, in accordance with principles or rules to be found in the law of England. These rules make up that department of English law which deals with the conflict of laws, and may be provisionally described as principles of the law of England, governing the extra-territorial operation of law or recognition of rights. This branch of English law is as much part of the law of England as the Statute of Frauds, or the Statute of Distributions. The subject, however, with which we are dealing is, partly from ambiguity of language, and partly from other causes, involved in so much obscurity of its own that we may well examine somewhat further into the nature of our topic, and look at the matter from a somewhat different point of view from the side whence we have hitherto regarded it.

The law of every country, as for example of England, consists of all the principles, rules, or maxims enforced by the Courts of that country under the authority of the state.

It makes no difference for our present purpose, whether these principles be written or unwritten; whether they be expressed in Acts of Parliament, or exist as customs; whether they are the result of direct legislation, or are created by judicial decisions. Any rule or maxim whatsoever, which, when the proper occasion arises, will be enforced by the Courts of England under the authority of the state, is part of the law of England. Thus the rule that land descends to the heir, derived as it is from the Common Law; the rule that personal property goes to the next of kin, depending as it now does upon the Statute of Distributions; the principle that a simple contract is not valid without a consideration; or the doctrine, created as it is by judicial legislation, that the validity of a marriage ceremony, wherever made, depends on the law of the country where the marriage is celebrated, are each of them, however different in character and origin, rules enforced by English Courts, and therefore each of them both laws and part of the law of England.

The law of England, however, taken in its most extended and most proper sense, may, in common with the law of every civilised country, *e. g.*, of Italy or of France, be divided into two branches.

The first branch of the law of England may be described, if not with absolute precision, yet with sufficient accuracy for our present object, as the body of rules which regulate the rights of the inhabitants of England and determine the legal effect of transactions taking place between Englishmen within the limits of England. Indirectly, indeed, these rules may, under certain circumstances, affect transactions taking place abroad; their direct and immediate effect, however, is to regulate the actions of men and women living in England. They may, therefore, for the sake of distinction from the other branch or portion of English law, be called the "territorial" or "local" law of England. This territorial law constitutes indeed so much the oldest and most important part of English law, that it has been constantly taken to be, and treated as, the whole of the law of the land. Blackstone's Commentaries, for example, though written with the avowed object of describing the whole of the "law of England," contain no mention of any rules which do not belong to the territorial or local law. With this branch of the law, important though it be, the writer on the conflict of laws has no direct concern.

The second branch of the law of England consists of rules which do not directly determine the rights or liabilities of particular persons, but which determine the limits of the jurisdiction to be exercised by the English Courts taken as a whole, and also the choice of the body of law, whether the territorial law of England or the law of any foreign country, by reference to which English Courts are to determine the different matters brought before them for decision.

These rules about jurisdiction and about the choice of law, which make up the second branch of the law of England, are directions for the guidance of the judges.

As to purely English transactions no such guidance can be needed. English Courts clearly have jurisdiction in respect of matters taking place within this country, for to determine the legal effect of such matters is the very object for which the Courts are constituted. The legal character, again, of acts done in England by Englishmen must obviously be determined by reference to the territorial law of England, since the very object for which this law is created is to regulate the actions of Englishmen in England.

The rules therefore in question, since they are inapplicable to purely English transactions, must have reference to cases which contain, or may contain, some foreign element. They are, in fact, directions for the guidance of the judges when called upon to deal with transactions which, either because of the foreign character of one, or of both, of the parties, or because something material to the case has been done, or is intended to be done, in a foreign country, or has been done with reference to some foreign law, may, possibly at least, require for their fair determination, reference to the provisions of some foreign law. If, for the sake of convenience, we dismiss for the moment from our attention all questions of jurisdiction, this second branch of the law of England may be described in the following terms. It is that part of the law of England which provides directions for the judges when called upon to adjudicate upon any question in which the rights of foreigners, or the effect of acts done, or to be done, in a foreign country, or with reference to a foreign law, require determination. These directions determine whether a given class of cases (*e. g.*, cases as to contracts made in foreign countries) must be decided wholly by reference to the territorial law of England, or either wholly, or in part, by reference to the law of some foreign country, *e. g.*, France. Since these directions for the choice of law may provide either that the territorial law of England shall, under certain circumstances, govern acts taking place abroad, *e. g.*, the proper execution of a will made in France by a testator domiciled in England, or that foreign law shall, under certain circumstances, govern acts done in England, *e. g.*, the proper execution of a will made in England by a testator domiciled in France, they may, as has been already intimated, be described as "rules for determining the extra-territorial operation of law," or better, "the extra-territorial recognition of rights," and the branch of law with which we are concerned is, if we include within it both rules as to jurisdiction and rules as to the choice of law, nothing else than the subject generally treated of by English and American writers under the title of Conflict of Laws, and by Continental authors under the title of Private International Law.

A mastery of this twofold division of the law of England (or for that matter of any civilised country) puts a student on his guard against an ambiguity of language which, unless clearly perceived, introduces confusion into every discussion concerning the conflict of laws.

The term "law of a given country," *e. g.*, law of England, or law of France, is an expression which, under different forms, necessarily recurs again and again in every treatise on private international law. It is further an expression which appears to be perfectly intelligible, and therefore not to demand any explanation. Yet, like many other current phrases, it is ambiguous. For the term "law of a given country" has, at least, two meanings. It may mean, and this is its most proper sense, every rule enforced by the Courts of that country. It may mean, on the other hand, and this is a very usual sense, that part of the rules enforced by the Courts of a given country which makes up the "local" or "territorial" law of a country. To express the same thing in a different form, the term "law of a country" may be used as either including the rules for the choice of law, or as excluding such rules and including only those rules or laws which, as they refer to transactions taking place among the inhabitants of a country within the limits thereof, I have called local or territorial law.

This ambiguity may be best understood by following out its application to the expression "law of England."

The term "law of England" may, on the one hand, mean every rule or maxim enforced or recognised by the English Courts, including the rules or directions followed by English judges as to the limits of jurisdiction and as to the choice of law. This is the sense in which the expression is used in the absolutely true statement that "every case which comes before an English Court must be decided in accordance with the law of England." The term "law of England" may, on the other hand, mean, not the whole of the law of England, but the local or territorial law of England excluding the rules or directions followed by English judges as to the limits of jurisdiction or as to the choice of law. This is the sense in which the expression is used in the also absolutely true statements that "the validity of a will executed in England by a Frenchman domiciled in France is determined by English judges not in accordance with the law of England but in accordance with the law of France," or that "a will of freehold lands in England, though executed by a foreigner abroad, will not be valid unless executed in conformity with the law of England," *i. e.*, with the provision of the Wills Act, 1837.

Hence the assertion that "while all cases which come for decision before an English Court must be decided in accordance with the law of England, yet many such cases are, and must be, decided in accordance, not with the law of England, but with the law of a foreign country, *e. g.*, France," though it sound paradoxical, or self-contradictory, is strictly true. The apparent contradiction is removed when we observe that in the two parts of the foregoing statement the term law of England is used in two different senses: in the earlier portion it means the whole law of England, in the latter it means the terirtorial law of England. This ambiguity is made plain to any one who weighs the meaning of the well-known dictum of Lord Stowell with regard to the law regulating the validity of a marriage celebrated in a foreign country. The question, it is therein laid down, "being entertained in "an English Court, it must be adjudicated according to the prin-"ciples of English law, applicable to such a case. But the only "principle applicable to such a case by the laws of England is, "that the validity of Miss Gordon's marriage rights must be tried "by reference to the law of the country, where, if they exist at all, "they had their origin. Having furnished this principle, the law "of England withdraws altogether, and leaves the legal question "to the exclusive judgment of the law of Scotland."

Let it be further borne in mind that the ambiguity affecting the term law of England affects the term law of France, law of Italy, and the like, and that with regard to statements where these terms are used, the reader should always carefully consider whether the expression is intended to include or to exclude the rules followed by the Courts of the given country, *e. g.*, France, as to the choice of law.

The general character of our subject being then understood, there remain several subordinate points which deserve consideration.

First. The branch of law containing rules for the selection of law is in England, as elsewhere, of later growth than the territorial law of the land.

The development of rules about the conflict of law implies both the existence of different countries governed by different laws,—a condition of things which hardly existed when the law of Rome was the law of the civilised world,—and also the existence of peaceful and commercial intercourse between independent countries,—a condition of things which had no continuous existence during the ages of mediæval barbarism.

It was not, therefore, until the development of something like the state of society now existing in modern Europe that questions about the conflict of laws powerfully arrested the attention of lawyers. It is a fact of great significance that the countries where attention was first paid to this branch of law, and where it has been studied with the greatest care, have been countries such as Holland, Germany, Great Britain, or the United States, composed of communities, which, though governed under different laws, have been united by the force either of law or of sentiment into something like one state or confederacy. States of this description, such for example as the United Netherlands, both felt sooner than others the need for giving extra-territorial effect to local laws, and also found less difficulty than did other countries in meeting this necessity; since the local laws which the Courts applied were not in strictness foreign laws, but, from one point of view, laws prevailing in different parts of one state. In this matter the history of France supplies one of these instructive exceptions which prove the rule. France was never a confederacy, but the provinces of the monarchy were governed by different laws. Hence the call for determining the extra-provincial effect of customs raised judicial problems about the choice of law. It is also noteworthy that few English decisions bearing on our subject are of earlier date than the Union with Scotland. None are known to me earlier than the accession of James I.

Secondly. The growth of rules for the choice of law is the necessary result of the peaceful existence of independent nations combined with the prevalence of commercial intercourse. From the moment that these conditions are realised, the judges of every country are compelled by considerations of the most obvious convenience to exercise a choice of law, or, in other words, to apply foreign laws. That this is so may be seen from an examination of the only courses which, when a case involving any foreign element calls for decision, are, even conceivably, open to the Courts of any country forming part of the society of civilised nations.

The necessity for choosing between the application of different laws might conceivably be avoided by rigid adherence to one of two principles.

The Courts of any country, *e. g.*, of England, might, on the one hand, decline to give any decision on cases involving any foreign element, *i. e.*, cases either to which a foreigner was a party, or which were connected with any transaction taking place wholly, or in part, beyond the limits of England.

No need for a choice of law would then arise, for the Courts would in effect decline to decide any question not clearly governed by the territorial law of England. This course of action would, however, exclude Englishmen no less than foreigners from recourse to English tribunals. For an Englishman who had entered into a contract with a Scotchman at Edinburgh, or with a Frenchman at Paris, would, if the principle suggested were rigidly carried out, be unable to bring an action in the English Courts for a breach of the contract. To which it may be added that, were the same principle adopted by the Courts of other countries, neither party to such a contract would have any remedy anywhere for its breach.

The English Court might, on the other hand, determine to decide every matter brought before them, whatever the cause of action and wherever it arose, solely with reference to the local law of England, and hence determine the effect of things done in Scotland or in France, exactly as they would do if the transactions had taken place between Englishmen in England.

Difficulties about the choice of law would, by the adoption of this principle, be undoubtedly removed, since the sole rule of selection would be, that the territorial law of England must in all cases be selected, or, in other words, that there must be no choice at all. Gross injustice would, however, inevitably result as well to Englishmen as to foreigners. The object of a legal decision or judgment is to enforce existing rights, or give compensation for the breach thereof, and it is not the object of a legal decision or judgment to create new rights, except in so far as such creation may be necessary for the enforcement or protection of rights already in existence. But to determine the legal effect of acts done in Scotland or in France, *e. g.*, of a contract made between Scotchmen in Edinburgh, solely with reference to the local law of England, would be to confer upon one or other of the parties, or perhaps upon both, new rights quite different from those acquired under the agreement, or, in other words, to fail in the very object which it is sought to attain by means of a judgment. That this is so becomes even more manifest if we place before our minds a case of which the foreign element consists in the fact that two persons have intended in some transaction to regulate their rights by reference to a foreign law. *A* and *X*, Englishmen, living in England, agree in London that certain property shall be settled, as far as English law allows, in accordance with the rules of French law. If in interpreting the settlement an English judge were to decline to take any notice of the law of France, he would clearly fail in carrying out the intention of the parties, or, in other words, would fail in ensuring to either of them his rights under the settlement.

If, therefore, it is impossible for the Courts of any country, without injustice and damage to natives, no less than to foreigners, either to decline all jurisdiction in respect of foreign transactions, or to apply to such transactions no rules except those of the local law, a consequence follows which has hardly been sufficiently noted. It is this: that the Courts of every civilised country are constrained, not only by logical, but by practical necessity, to concern themselves with the choice of law, and must occasionally give extra-territorial effect now to their own local law, now to the law of some foreign state.

Is, or is not the enforcement of foreign law a matter of "comity"? This is an inquiry which has greatly exercised the minds of jurists. We can now see that the disputes to which it has given rise are little better than examples of idle logomachy. If the assertion that the recognition or enforcement of foreign law depends upon comity means only that the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the state where it is allowed to operate, the statement expresses, though obscurely, a real and important fact. If, on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon comity is meant to imply that, to take a concrete case, when English judges apply French law, they do so out of courtesy to the

French Republic, then the term comity is used to cover a view which, if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language. The application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners. It were well too in this matter to give heed to two observations. The first is that the Courts, *e. g.*, of England, never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws. The second observation is, that disputes about the effect of comity—and the remark applies to other controversies about the conflict of laws—have been confused by mixing together the question what, on a given subject, is the rule, or, in other words, the law which will be enforced by the judges, with the different inquiry, what are the motives which have led judges or legislators to adopt a particular rule as law. Assume, for the sake of argument, the truth of the doctrine that the enforcement of foreign laws depends upon comity. This dogma throws no light whatever on the nature of the rules upheld by English or other Courts as to the enforcement of foreign laws. To know, for example, that the Courts are influenced by considerations of comity is no guide to any one who attempts to answer the inquiry whether the tribunals of a given country accept "domicil," as do English Courts, or "nationality," as do Italian Courts, as determining the law which affects the validity of a will.

Thirdly. Though the rules as to extra-territorial effect of law enforced by our Courts are part of the law of England, it should be noted that the law of every other civilised country, *e. g.*, of France, of Italy, or of Germany, contains rules for the choice of law, not indeed identical with, but very similar to, the rules for the same purpose to be found in the law of England.

That this should be so is natural. In any given case the laws among which a choice may rationally be made are limited in number. The selection of one or more of these laws is not a matter of caprice, but depends upon more or less definite reasons which are likely to influence all Courts and legislators. The grounds, for example, which induce the Courts of England to determine the formal validity of a contract, by the law of the place where it is made, are likely to weigh with the Courts of France or of Germany. There exists, moreover, a palpable convenience in the adoption by different countries of the same principle for the choice of law. Hence the mere fact that a particular rule for the selection of law has been followed by the French and American Courts is a valid though not absolutely decisive reason in favor of its being adopted by English Courts; and an appreciation of the advantages to be derived from uniformity has undoubtedly influenced both Courts and legislatures, when called upon to determine in a given class of cases what should be the rule as to the extra-territorial effect of law. Thus has come into existence a body of rules which, though in different countries they exist as laws only by virtue of the law of each particular country, and though they are by no means everywhere identical, exhibit wherever they exist marked features of similarity. This likeness is increased by the fact that the object aimed at by the Courts of different countries, in the adoption of rules as to the extra-territorial effect of law, is everywhere in substance one and the same. This aim is, in the main, to secure the extra-territorial effect of rights. All, or nearly all, the rules as to the choice of law, which are adopted by different civilised countries, are provisions for applying the principle that rights duly acquired under the law of one country shall be recognised in every country. Thus the law of England and the law of France seek in this respect the same object, viz., the securing that the rights which a man has attained by marriage, by purchase, or otherwise, *e. g.*, in Italy, shall be enforceable and enjoyable by him in England or France, and, conversely, that the rights which he has acquired in England may be enforceable and enjoyable by him in Italy. This community of the aim, pursued by the Courts and legislatures of different countries, lies at the very foundation of our subject. It is of itself almost enough to explain the great similarity between the rules as to the choice of law adopted by different countries.

Fourthly. The department of law, whereof we have been considering the nature, has been called by various names, none of which are free from objection.

By many American writers, and notably by Story, it has been designated as the "conflict of laws." The apparent appropriateness of the name may be best seen from an example of the kind of case in which a "conflict" is supposed to arise. *H* and *W*, Portuguese subjects, are first cousins. By the law of Portugal they are legally incapable of intermarriage. They come to England and there marry each other in accordance with the formalities required by the English Marriage Acts. Our Courts are called upon to pronounce upon the validity of the marriage. If the law of England be the test the marriage is valid; if the law of Portugal be the test the marriage is invalid. The question at issue, it may be said, is, whether the law of England or the law of Portugal is to prevail. Here we have a conflict, and the branch of law which contains rules for determining it may be said to deal with the conflict of laws, and be for brevity's sake called by that title.

The defect, however, of the name is that the supposed "conflict" is fictitious and never really takes place. If English tribunals decide the matter in hand, with reference to the law of Portugal, they take this course not because Portuguese law vanquishes English law, but because it is a principle of the law of England that, under certain circumstances, marriages between Portuguese subjects shall depend for their validity on conformity with the law of Portugal. Any such expression, moreover, as "conflict," or "collision," of laws, has the further radical defect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed, is often a matter too plain to admit of doubt. No judge probably ever doubted that the validity of a contract for the purchase and sale of goods between French subjects made at Paris, and performed, or intended to be performed, in France, depends upon the rules of French law. The term conflict of laws has been defended on the ground of its applicability, not to any collision between the laws themselves, but to a conflict in the mind of a judge on the question which of two systems of law should govern a given case.

This suggestion gives, however, a forced and new sense to a received expression. It also amounts simply to a plea that the term conflict of laws may be used as an inaccurate equivalent for the far less objectionable phrase choice of law.

Modern authors, and notably Mr. Westlake, have named our subject Private International Law.

This expression is handy and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign law which prevails in all civilised countries, such as England, France, and Italy. The tribunals of different countries, as already pointed out, follow similar principles in determining what is the law applicable to a given case, and aim at the same result, namely, the recognition in every civilised country of rights acquired under the law of any other country. Hence an action brought to enforce a right acquired under the law of one country (*e. g.*, of France) will in general be decided in the same manner in whatever country it be maintained, whether, that is to say, it be brought in the Courts of England or of Germany. On this fact is based the defence of the name Private International Law. The rules, it may further be said, which the words designate, affect the rights of individuals as against one another, and therefore belong to the sphere of "private," not of public law; and these rules, as they constitute a body of principles common to all civilised countries, may be rightly termed "international."

The term, however, is at bottom inaccurate. The words private international law "should mean, in accordance with that use "of the word 'international' which, besides being well established "in ordinary language, is both scientifically convenient and ety-"mologically correct, 'a private species of the body of rules which "prevails between one nation and another.' Nothing of the sort "is, however, intended; and the unfortunate employment of the "phrase, as indicating the principles which govern the choice of "the system of private law applicable to a given class of facts, has "led to endless misconception of the true nature of this depart-"ment of legal science." Nor does the inaccuracy of the term end here. It confounds two classes of rules, which are generically different from each other. The principles of international law, properly so called, are truly "international" because they prevail between or among nations; but they are not in the proper sense of the term "laws," for they are not commands proceeding from any sovereign. On the other hand, the principles of private international law are "laws" in the strictest sense of that term, for they are commands proceeding from the sovereign of a given state, *e. g.*, England or Italy, in which they prevail; but they are not "international," for they are laws which determine the private rights of one individual as against another, and these individuals may, or may not, belong to one and the same nation. Authors, in short, who like Fœlix divide international law into public international law and private international law, use the words international and law in each of these expressions in a different sense. Such ambiguity of language, unless fully acknowledged, must lead, as it has led, to confusion of thought. Nor is much gained by such an amendment of terminology as is achieved by a transposition of words. The expression "international private law" is no doubt a slight improvement on private international law, as it points out that the rules which the name denotes belong to the domain of private law. But the name, improve it as you will, has the insuperable fault of giving to the adjective international a meaning different from the sense in which it is generally and correctly employed.

Other names for our subject, such as "comity," the "local limits of law," "intermunicipal law," and the like, have not obtained sufficient currency to require elaborate criticism. Their fault is, that either they are too vague for the designation of the topic to which they are applied, or else they suggest notions which are inaccurate. Thus the term "comity," as already pointed out, is open to the charge of implying that a judge, when he applies foreign law to a particular case, does so as a matter of caprice or favour, whilst the term "intermunicipal law" can be accurately used only by giving to each half of the word "intermunicipal" a sense which both is unusual and also demands elaborate explanation. A more accurate description of our topic is (it is submitted) "the extra-territorial effect of law," or better, Professor Holland's phrase "the extra-territorial recognition of rights." But such expressions are descriptions, not names. A writer, therefore, called upon to deal with our topic will act wisely in refusing to be tied down to any set form of words. He will, when convenient, used the admittedly inaccurate terms, conflict of laws, or private international law. But he will himself remember, and will attempt to impress upon his readers, that these names are nothing more than convenient marks by which to denote the rules maintained by the Courts of a given country, as to the selection of the system of law which is to be applied to the decision of cases that contain, or may contain, some foreign element, and also the rules maintained by the Courts of a given country, as to the limits of the jurisdiction to be exercised by its own Courts as a whole, or by foreign Courts.

STATE DEFINED.

COOLEY'S CONST. LIM. P. 3. (6TH ED.)

A STATE is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength. The terms *nation* and *State* are frequently employed, not only in the law of nations, but in common parlance, as importing the same thing; but the term *nation* is more strictly synonymous with *people,* and while a single State may embrace different nations or peoples, a single nation will sometimes be so divided politically as to constitute several States.

In American constitutional law the word *State* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the federal government.

Sovereignty, as applied to States, imports the supreme, absolute, uncontrollable power by which any State is governed. A State is called a sovereign State when this supreme power resides within itself, whether resting in a single individual, or in a number of individuals, or in the whole body of the people. In the view of international law, all sovereign States are and must be equal in rights, because from the very definition of sovereign State, it is impossible that there should be, in respect to it, any political superior.

The sovereignty of a State commonly extends to all the subjects of government within the territorial limits occupied by the associated people who compose it; and, except upon the high seas, which belong equally to all men, like the air, and no part of which can rightfully be appropriated by any nation, the dividing line between sovereignties is usually a territorial line. In American constitutional law, however, there is a division of the powers of sovereignty between the national and State governments by subjects: the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and Territories, while the States have the like complete power, within their respective territorial limits, over other subjects. In regard to certain other subjects, the States possess powers of regulation which are not sovereign powers, inasmuch as they are liable to be controlled, or for the time being to become altogether dormant, by the exercise of a superior power vested in the general government in respect to the same subjects.

INTERNATIONAL LAW A PART OF THE LAW OF THE LAND.

COOLEY'S BLACKSTONE, BK. 4, CH. 5. (3RD ED.)

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. And, as none of these States will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states, this law, wherever it contradicts, or is not provided for by, the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilized world. Thus, in mercantile questions, such as bills of exchange, and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So, too, in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.

But though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations, in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the State to which he belongs, and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

DOMICIL.

DEFINITION AND REQUISITES OF DOMICIL.

HAYES v. HAYES, 74 ILL., 312. (1874.)

WRIT OF ERROR to the Circuit Court of Rock Island County; the Hon. G. W PLEASANTS, Judge, presiding.

Mr. WILLIAM H. GEST, for the plaintiffs in error.

Messrs. CONNELLY & MCNEAL, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is a writ of error to the Rock Island Circuit Court, to reverse a decree entered therein on the chancery side of that court, in a proceeding commenced by bill on behalf of Amherst Hayes and others, claiming to be the heirs at law of the Rev. Harvey H. Hayes, deceased, and against his widow, Maria B. Hayes, who, with one Carlos L. Bascom, had taken out letters of administration on the estate of the decedent.

It appears by the bill that Dr. Hayes died on the 20th July, 1867, at Rock Island, leaving Maria B. Hayes, his widow, and no child or children, nor descendant of any child, and no parents. Letters of administration were granted by the county court of Rock Island county August 5, 1867. The bill alleges that deceased was a resident of the State of Iowa at the time of his death, within the view of the law of that State as to distribution of the personal estate of an intestate; that the appraisers have certified to the widow the sum of eighteen hundred and thirty-two dollars as the "widow's award," and complains that she claims the whole of the personal estate. The prayer of the bill is, that this award be set aside, and the whole surplus, after the debts are paid, may be distributed according to the law of Iowa.

An issue was made up on the question, where was the deceased domiciled at the time of his death, within the meaning of the law as to the distribution of the personalty. This issue was tried by the court, by consent, without a jury, and the court found that this State was the domicile of the deceased, so far as the succession to his personalty was concerned.

The plaintiffs in error insist that this finding is against the evidence.

We have given the testimony, voluminous as it is, a careful reading and full consideration, and have reached the conclusion it supports the decree.

It is said by authoritative text-writers, that the term "domicile," in its ordinary acceptation, means the place where a person lives or has his home. In a strict legal sense, that is properly the domicile of a person, where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Story's Confl. of Laws, 39, Sec. 41. It is further said, actual residence is not indispensable to retain a domicile after it is once acquired; but it is retained, *animo solo,* by the mere intention not to change it and adopt another. Ib. 42, Sec. 44.

Testing this case by these rules, the finding was clearly right. It is not denied that the domicile of Dr. Hayes, from 1852 to May, 1860, was Rock Island, at which time, there being some disagreement with his wife, she went from their home in Rock Island on a visit of uncertain duration to her relatives in Washington city, and he himself went to Bentonsport, in the State of Iowa, to supply a pulpit there for one year. Before he left Rock Island he rented the homestead and a part of the furniture, storing the balance on the premises. When the year expired he engaged for another year, which terminated in the spring of 1862, when he left, spending the spring and summer in visiting his wife in Washington and his friends in the East. In the fall of 1862 he returned to this State, visiting some of his relatives, and spent the winter with a brother, Gordon Hayes, living at Brighton, Iowa. In the spring of 1863 he accepted an invitation to supply a pulpit at Kossuth, Iowa, for one year, and after its expiration he renewed the engagement for another year, but neither at Bentonsport nor at Kossuth was he installed as pastor. Having some spare funds, he bought in Kossuth a house and lot, on speculation, in which he slept, taking his meals at a hotel. He voted at the election in 1863, and at the presidential election in 1864, the laws of Iowa conferring the elective franchise on a resident for six months.

That the house was not purchased as a residence is clear from the testimony, it was an investment merely.

When his engagement at Kossuth closed, in the summer of 1865, he left that place and returned to Rock Island, staying there but a short time, and then proceeding to Washington city, where his wife remained engaged in keeping a boarding-house. With the exception of about two months in 1866, which he spent at Rock Island, engaged in making repairs on his property there, he remained at Washington with his wife, until the last of June or first of July, 1867, when he returned to Rock Island, staying but a short time, proceeded to Kossuth, collected the last payment due on the property he had there sold, and returned to Rock Island with his library and some other articles of property, and while there, on the twentieth of July, 1867, he made a sudden exit from this world.

At the time of his death he was the owner of several houses and lots in the city of Rock Island, and other real estate in other parts of the State. His wife, the defendant in this suit, was at no time in Iowa, whilst her husband resided there; and after his death, closing up her affairs in Washington, she returned to the old homestead, where she has since remained.

There is a strong current running through all the mass of testimony tending to show it was never the intention of Dr. Hayes to make Iowa his home. It is inferable he would have done so had his wife joined him there and been pleased with the place and prospects. All his letters, and much of the testimony, go to show Iowa was not regarded by him as his home. Nothing can be inferred from the fact of his having voted there; that act was consistent with his domicile in this State, the law of Iowa giving the right to a resident of six months. He was such resident, undoubtedly, and as such had a right to vote. This could, by no possibility, effect a change of domicile. To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. Nothing of this is discernible in the testimony in this record. The case of *Smith* v. *The People*, 44 Ill. 16, may be referred to in support of this doctrine, and other cases cited. *Smith et al.* v. *Croom et al.* 7 Fla. 200; *Shaw* v. *Shaw*, 98 Mass. 158. But the doctrine does not need the citation of authorities in its support.

There can be no doubt that the unsettled condition of the deceased was in a great degree owing to domestic disturbances. The great bulk of his property was in Rock Island, and to that place his inclinations would naturally tend. To that his thoughts would revert, for it was his home, which he had never abandoned;

> "He still had hopes—his long vexations past—
> There to return, and die at home at last;"

and his hope was accomplished.

It is conceded, domicile is a question of fact and intention. This is the proposition we have argued, and from the evidence we are satisfied Dr. Hayes had no fixed, permanent home in Iowa, nor any other home than Rock Island, and the circuit court in so finding found the truth, as we understand it. And the decree of that court must be affirmed. The domicile of succession to the estate of Dr. Hayes was in the State of Illinois at the time of his death.

Decree affirmed.

DOMICILS OF ORIGIN AND OF CHOICE.

UDNY V. UDNY. 1. L. R. SCOTCH & DIV. APP. CS. 441. (1869.)

THE late Colonel *John Robert Fullerton Udny*, of *Udny*, in the county of *Aberdeen*, though born at *Leghorn*, where his father was consul, had by paternity his domicil in *Scotland*. At the age of fifteen, in the year 1794, he was sent to *Edinburgh*, where he remained for three years. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married Miss *Emily Fitghugh*,—retired from the army,—and took upon lease a house in *London*, where he resided for thirty-two years, paying occasional visits to *Aberdeenshire*.

In 1844, having got into pecuniary difficulties, he broke up his establishment in *London* and repaired to *Boulogne*, where he remained for nine years, occasionally, as before, visiting *Scotland.* In 1846 his wife died, leaving the only child of her marriage, a son, who, in 1859, died a bachelor.

Some time after the death of his wife *Colonel Undy* formed at *Boulogne* a connection with Miss *Ann Allat,* which resulted in the birth at *Camberwell,* in *Surrey,* on the 9th of May, 1853, of a son, the above respondent, whose parents were undoubtedly unmarried when he came into the world. They were, however, united afterwards in holy matrimony at *Ormiston,* in *Scotland,* on the 2nd of January, 1854, and the question was whether the Respondent, under the circumstances of the case, had become legitimate *per subsequens matrimonium.*

The Court of Session (First Division) on the 14th of December, 1866 (3rd Series, vol. v. p. 164), decided that Colonel *Udny's* domicil of origin was Scotch, and that he had never altered or lost it, notwithstanding his long absences from *Scotland.* They therefore found that his son, the Respondent, "though illegitimate at his birth, was legitimated by the subsequent marriage of his parents." Hence this appeal, which the House regarded as involving questions of greatly more than ordinary importance.

The Appellant argued his own case.

Sir *Roundell Palmer,* Q. C., Mr. *Mellish,* Q. C., Mr. *Fraser,* and Mr. *Bristow,* appeared for the Respondent.

The following opinions of the Law Peers fully state the facts, the authorities, and the legal reasoning.

THE LORD CHANCELLOR:—

My Lords,—In this case the Appellant prays a judicial declaration that the Respondent is a bastard,—and is not entitled to succeed to the entailed estates of *Udny,* in *Aberdeenshire.*

The question depends upon what shall be determined to have been the domicil of the Respondent's father, the late Colonel *Udny,* at the time of his birth,—at the time of the Respondent's birth,—and at the time of the Colonel's marriage with the Respondent's mother.

The Appellant, who argued his case in person with very considerable ability, contended:—First: That the domicil of origin of Colonel *Udny* was English. Secondly: That even if that were not so, yet that at the time of his first marriage, in 1812, he had abandoned *Scotland* for *England,* sold his commission in the army, took a house on lease for a long term in *London,* and resided there till he left *England* for *France* in 1844, for the purpose of avoiding his creditors; and that having thus acquired an English domicil he retained it, and never re-acquired his Scotch domicil. Thirdly: That, at all events, if he did recover his Scotch domicil, yet it was not recovered at the date of the Respondent's birth in May, 1853, nor even at the date of the intermarriage of the Respondent's parents in January, 1854.

As regards the first question, your Lordships did not hear the Respondents. You were satisfied that Colonel *Udny's* father, the consul, had never abandoned his Scottish domicil. Consequently you held that Colonel *Udny's* own domicil of origin was clearly Scotch, that having been the domicil of his father at the Colonel's birth.

A more difficult inquiry arose as to the domicil of Colonel Udny at the date of the Respondent's birth in May, 1853.

Colonel *Udny* appears to have left the army about the same time that he married his first wife, viz. in 1812, when he executed a contract and other instruments connected with his marriage, containing provisions referable to Scottish law, and describing himself as *of Udny, in the county of Aberdeen.* He, on his marriage, however, took a long lease of a house in *London,* in which he resided till 1844. He made frequent visits to *Scotland,* but had no residence there. He at one time contemplated restoring *Udny Castle*—and even three years after he had commenced his residence in *London* appears to have still thought it possible that he might complete the restoration—and plans were about that time submitted to him for that purpose. For many years, however, he seems to have abandoned all hope of so doing, owing to his means being insufficient. He was appointed a magistrate in *Scotland,* but appears not to have acted as such. When in *Scotland* he usually resided with friends, but occassionally at hotels in the neighborhood of his property, and he continually received detailed accounts of the estates, and took much interest in their management. His choice of *England* as a residence appears to have been considerably influenced by his taste for the sports of the turf. By his first marriage he had a son, *John Augustus Udny*.

The Judge Ordinary and the Court of Session concurred in opinion that the long and habitual residence in *England* was not sufficient to amount to an abandonment of the Colonel's Scottish domicil of origin. This point, I confess, appears to me to be one of great nicety. I am not prepared to say that I am satisfied with that conclusion; but neither should I be prepared, without further consideration, to recommend to your Lordships a reversal of the judgment appealed from on the ground that the opinions of the Court below upon this point were erroneous.

Owing to this action having been raised in the Colonel's lifetime, the Court below had the advantage of the testimony of Colonel *Udny* himself, a circumstance which does not often occur in questions of domicil. It appears to have been very candidly given, and (as was observed by the Lord Ordinary) by no means overstates the case in favor of the continuance of his Scottish domicil.

Several other witnesses were examined, who do not carry the case further. But, be this as it may, the events in the Colonel's life, subsequent to 1844, appear to me to be those upon which the question of his domicil at the birth of the Respondent really depend.

In 1844, the Colonel, after having been involved for some time in pecuniary difficulties (owing chiefly to his connection with the turf), was compelled to leave *England*, in order to avoid his creditors. He at first thought of taking some house "in the country," by which I think he meant in the rural parts of *England;* but afterwards the pressure of creditors became too great to admit of his so doing, and he appears, in the autumn, to have visited *Scotland*, where correspondence took place between himself and his agent as to arranging a trust deed by which Colonel *Udny* and his son, *John Augustus*, were to make provision, as far as possible, for the payment of their debts. On the 2nd of October, he writes to his agent, mentioning that a creditor is pressing for immediate payment of £1200—"So let there be no time lost." And by a letter of his son of the 4th of November, 1844, it appears that his father had left *England* for *Calais* on the previous day. He about this time sold the lease of the *London* house in which he had so long resided. He sold also (as he himself states in his evidence) all his furniture and "everything that was in the house, including what had belonged to his mother, his sister, and his first wife."He went from *Calais* to *Boulogne,* and there resided in a hired house till 1853. He says in his evidence:

When I went to *Boulogne* I had no further connection with *London.* I had a married sister living there, and various other relations. During the nine years when my headquarters were at *Boulogne* I never resided in *London.* The time that I came over for my wife's confinement in 1853 was the first time that I had visited *London* after leaving it for *Boulogne.* I remained there at that time only about a couple of days and returned to *Boulogne.* While I was at *Boulogne* I came over more than once to *Scotland* to visit my property. These were not long visits, but I did make them.

The wife alluded to in the above statement is the mother of the Respondent. The Colonel's first wife did not go with him to *Boulogne,* but she joined him for a short time in 1845, leaving him afterwards on account of ill-health, and residing with his brother in *London.* She died in 1846.

The Colonel at *Boulogne* formed an illicit connection with the mother of the Respondent, and in May, 1853, came to *England* in consequence of a wish that she should be attended in her confinement by an English accoucheur; and on the 9th of May, 1853, the Respondent was born at *Camberwell.* The Colonel appears to have returned almost immediately to *Boulogne.* He had been living on a very scanty allowance—his eldest son, too, was embarrassed—and at a very early period after the birth of the Respondent the father and son appear to have thought that the birth of this child might facilitate the barring of the entail of the Scotch estates; for in a letter of the 29th of May, 1853, the Colonel writes to his son: "I shall be glad to hear of your interview with Mr. *Skinner*" (their legal adviser). "I think the great difficulty will be the uncertainty of the child's life; however, you will talk over all these matters with him."

The Colonel was advised that by marrying the Respondent's mother he might, according to the law of *Scotland,* render the Respondent legitimate, and that then the concurrence of the Appellant in barring the entail would not be requisite. The advice on this latter point was erroneous; but it is enough to say that the Colonel came over to *Scotland* in November, 1853, clearly with the intent to celebrate a marriage with the Respondent's mother, and with the hope of raising money for the benefit of his elder son and himself by getting rid of the entail. He was under an impression that his English creditors could not molest him whilst in *Scotland.* He was much mortified afterwards to find that this was not the case, and wrote several letters to his son and others expressive of his disgust at having been hurried away from *Boulogne,* and his dislike to residing in *Scotland.* But I cannot bring my mind to doubt that his intention in returning to *Scotland* was to do that which he accomplished, namely, to marry, in regular form, the Respondent's mother, and for that purpose to be domiciled there.

In his letter of the 9th of July, 1859, he expressly asserts it to have been his intention in 1853 to be permanently domiciled in *Scotland;* but that letter may be open to the objection that it was written very shortly *ante litem motam.* I do not think that we can safely rely on the deed of disposition by his elder son of the 2nd of December, 1853, which recites "that the Colonel had made arrangements to return again to and to remain in *Scotland,*" because the father was not a party to that instrument. But, on the other hand, though the recital itself may not be evidence, yet the Colonel took advantage of that instrument. And the whole course of the arrangements made shows that the Colonel's intent, for which alone he came to *Scotland,* was by his marriage to make the Respondent legitimate, and by means of that legitimation to deal with the estates. These objects required a Scottish domicil: and it would be singular to hold that he having, in fact, married on the 2nd of January, 1854, and resided in *Scotland* thenceforth to his death in 1861 (after the raising of the present action), the domicil must not be taken to have been Scottish, as it ought to be, for the purposes he had in view from the time of his return in 1853. It is true that the death of his elder son in the interval between the marriage and death of the Colonel, and the consequent falling in of the policies of insurance on his life, placed the Colonel to a certain degree in an easier position, and removed his apprehension of difficulty from his creditors: but I think his possible intention to leave *Scotland* (if molested by creditors) in no way disproves the existence of a resolution to remain, as he did, in that country (if allowed so to do) as his chosen and settled abode.

It seems therefore clear to me that the Colonel was, at the time of his marriage, domiciled in *Scotalnd;* but the question remains as to what was his domicil in May, 1853, at the time of the Respondent's birth.

If he were domiciled in *England* up to 1844, and retained an English domicil up to and after May, 1853, then the question would arise, which has not been determined in any case by the Scottish Courts, whether the child, being illegitimate at its birth, and its putative father not having at that time a power of legitimating him by means of a subsequent marriage with his mother, could be legitimated by his putative father subsequently *acquiring* a Scottish domicil before marriage with the mother.

I have myself held, and so have other Judges in the English Courts, that according to the law of *England* a bastard child whose putative father was English at its birth could not be legitimated by the father afterwards acquiring a foreign domicil and marrying the mother in a country by the law of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion. The *status* of the child,—with respect to its capacity to be legitimated by the subsequent marriage of its parents,—depends wholly on the *status* of the putative father, not on that of the mother. If the putative father have an English domicil the English law does not, at the birth of the child, take notice of the putative father's existence. But if his domicil be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Munro* v. *Munro* (7 Cl. & F. 842) is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognizes the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in *France,* or by marriage only, as in *Scotland.* I do not think that the English law can recognise a capacity in any Englishman, by change of domicil, to cause his paternity and consequent power of legitimation to be recognised. But however this may be, the question does not, in my judgment, here arise.

I am of opinion that the English domicil of Colonel *Udny,* if it were ever acquired, was formally and completely abandoned in 1844 when he sold his house and broke up his English establishment with the intention not to return. And, indeed, his return to that country was barred against him by the continued threat of process by his creditors. I think that on such abandonment his domicil of origin revived. It is clear that by our law a man must have some domicil, and must have a single domicil. It is clear, on the evidence, that the Colonel did not contemplate residing in *France*—and, indeed, that has scarcely been contended for by the Appellant. But the Appellant contends that when once a new domicil is acquired, the domicil of origin is obliterated, and cannot be re-acquired more readily or by any other means than those by which the first change of the original domicil is brought about, namely, *animo et facto.* He relied for this proposition on the decision in *Munro* v. *Douglas* (5 Madd. 379) where Sir *John Leach* certainly held that a Scotsman, having acquired an Anglo-Indian domicil, and having finally quitted *India,* but not yet having settled elsewhere, did not re-acquire his original domicil; saying expressly, "I can find no difference in principle between an original domicil and an acquired domicil." That he acquired no new domicil may be conceded, but it appears to me that sufficient weight was not given to the effect of the domicil of origin, and that there is a very substantial difference in principle between an original and an acquired domicil. I shall not add to the many ineffectual attempts to define domicil. But the domicil of origin is a matter wholly irrespective of any animus on the part of its subject. He acquires a certain *status civilis,* as one of your Lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicil being simply determined by that of his father. A change of that domicil can only be effected *animo et facto*—that is to say, by the choice of another domicil, evidenced by residence within the territorial limits to which the jurisdiction of the new domicil extends. He, in making this change, does an act which is more nearly designated by the word "settling" than by any one word in our language. Thus we speak of a colonist settling in *Canada* or *Australia*, or of a Scotsman settling in *England*, and the word is frequently used as expressive of the act of change of domicil in the various judgments pronounced by our Courts. But this settlement *animo et facto* by which the new domicil is acquired is, of course, susceptible of abandonment if the intention be evidenced by facts as decisive as those which evidenced its acquirement.

It is said by Sir *John Leach*, that the change of the newly-acquired domicil can only be evidenced by an actual settling elsewhere, or (which is, however, a remarkable qualification) by the subject of the change dying *in itinere* when about to settle himself elsewhere. But the dying *in itinere* to a wholly new domicil would not, I apprehend, change a domicil of origin if the intended new domicil were never reached. So that at once a distinction is admitted between what is necessary to re-acquire the original domicil and the acquiring of a third domicil. Indeed, the admission of Sir *John Leach* seems to have been founded on the actual decision of the case of *Colville* v. *Saunders*, cited in full in *Munroe* v. *Douglas*, from the Dictionary of Decisions. In that case, a person of Scottish origin became domiciled at *St. Vincent*, but left that island, writing to his father and saying that his health was injured, and he was going to *America*; and that if he did not succeed in *America* he would return to his native country. He was drowned in *Canada*, and some memoranda were found indicating an intention to return to *Scotland*, and it was held that his Scottish domicil had revived.

It seems reasonable to say that if the choice of a new abode and actual settlement there constitute a change of the original domicil, then the exact converse of such a procedure, viz., the intention to abandon the new domicil, and an actual abandonment of it, ought to be equally effective to destroy the new domicil. That which may be acquired may surely be abandoned, and though a man cannot, for civil reasons, be left without a domicil, no such difficulty arises if it be simply held that the original domicil revives. That original domicil depended not on choice but attached itself to its subject on his birth, and it seems to me consonant both to convenience and to the currency of the whole law of domicil to hold that the man born with a domicil may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment; and further, to hold that every acquired domicil is capable of simple abandonment *animo et facto* the process by which it was acquired, without its being necessary that a new one should be at the same time chosen, otherwise one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicil of origin cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice.

Lord *Cottenham* in *Munro* v. *Munro* (7 Cl. & F. 871) says, "So firmly indeed did the civil law consider the domicil of origin to adhere that it holds that if it be actually abandoned and a domicil acquired, but that again abandoned, and no new domicil acquired in its place, the domicil of origin revives." No authority is cited by his Lordship for this. He probably alluded to some observations which occur in the case of *La Virginie* (5 Rob. Adm. 99) where Sir *William Scott* said:

> It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicil in the case of a native subject than to impress the national character on one who is originally of another country.

In the case of *The Indian Chief* (3 Rob. Adm. 12) the question was whether the ship was the property of a British subject: for if so, her trading was illegal. The owner, Mr. *Johnson*, averred that he was an American. Sir *William Scott* held him to be an American by origin, but that having come to *England* in 1783 and remained till 1797, he had become an English merchant.

But he quitted *England* before the capture of the vessel, and letters were produced shewing his intention to return to *America,* which he does not appear to have reached until after. And Sir *William Scott* says, "The ship arrives a few weeks after his departure, and taking it to be clear that the natural character of Mr. *Johnson* as a British merchant was founded on residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that from the moment he turned his back on the country where he had resided on his way to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bona fide* to quit the country *sine animo revertendi.*"

Story, in his Conflict of Laws, sect. 47 (at the end), says: "If a man has acquired a new domicil different from that of his birth, and he removes from it with intention to resume his native domicil, the latter is re-acquired even while he is on his way, for it reverts from the moment the other is given up."

The qualification that he must abandon the new domicil with the special intent to resume that of origin is not, I think, a reasonable deduction from the rules already laid down by decision, because intent not followed by a definitive act is not sufficient. The more consistent theory is, that the abandonment of the new domicil is complete *animo et facto,* because the *factum* is the abandonment, the *animus* is that of never returning.

I have stated my opinion more at length than I should have done were it not of great importance that some fixed common princilpes should guide the Courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent *"exuere patriam,"* or to become "a Frenchman instead of an Englishman," go beyond the question of domicil. The question of naturalization and of allegiance is distinct from that of domicil. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot, at present at least, put off and resume at will obligations of obedience to the government of the country of which at his birth he is a subject, but he may many times change his domicil. It appears to me, however, that each acquired domicil may be also successively abandoned *simpliciter*, and that thereupon the original domicil *simpliciter* reverts.

For these reasons, my Lords, I propose to your Lordships the affirmation of the interlocutors complained of, and the dismissal of the appeal with costs.

LORD CHELMSFORDS :—

My Lords, at the opening of the argument of this appeal for the Respondent his learned counsel were informed that your Lordships were of opinion that the domicil of Colonol *Udny* down to the year 1812 was his Scotch domicil of origin, and that the case was therefore narrowed down to the questions raised by the Appellant,—whether that domicil had been superseded by the acquisition of another domicil in *England*, and whether such after-acquired domicil was retained at the time of the birth of the Respondent, and continued down to the period of the marriage of the Respondent's parents in *Scotland*.

In considering these questions it will be necessary to ascertain the nature and effect of a domicil of origin; whether it is like an after-acquired domicil, which when it is relinquished can be re-acquired only in the same manner in which it was originally acquired, or whether, in the absence of any other domicil, the domicil of origin must not be had recourse to for the purpose of determining any question which may arise as to a party's personal rights and relations.

Story, in his Conflict of Laws (sect. 48), says, "The moment a foreign domicil is abandoned the native domicil is re-acquired." Great stress was laid by the Appellant in his reference to this passage upon the word "re-acquired," which is obviously an inaccurate expression. For, as was pointed out in the course of the argument, a domicil of origin is not an acquired domicil, but one which is attributed to every person by law. The meaning of *Story*, therefore, clearly is, that the abandonment of a subsequently-acquired domicil *ipso facto* restores the domicil of origin. And this doctrine appears to be founded upon principle, if not upon direct authority.

It is undoubted law that no one can be without a domicil. If, then, a person has left his native domicil and acquired a new one, which he afterwards abandons, what domicil must be resorted to to determine and regulate his personal *status* and rights? Sir *John Leach*, V. C., in *Munroe v. Douglas* (5 Madd. 405), held that in the case supposed the acquired domicil attaches to the person till the complete acquisition of a subsequent domicil, and (as to this point) he said there was no difference in principle between the original domicil and an acquired domicil. His Honour's words are: "A domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto,* and necessarily remains until a subsequent domicil be acquired, unless the party die *in itinere* towards an intended domicil." There is an apparent inconsistency in this passage, for the Vice-Chancellor having said that a domicil necessarily remains until a subsequent domicil be acquired *animo et facto,* added, "unless the party die *in itinere* towards an intended domicil;" that is, at a time when the acquisition of the subsequent domicil is incomplete and rests in intention only.

I cannot understand upon what ground it can be alleged that a person may not abandon an acquired domicil altogether and carry out his intention fully by removing *animo non revertendi;* and why such abandonment should not be complete until another domicil is acquired in lieu of the one thus relinquished.

Sir *William Scott,* in the case of *The Indian Chief* (3 Rob. Adm. 20), said: "The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to a person from the moment he puts himself in motion *bona fide* to quit the country *sine animo revertendi,*" and he mentions the case of a British-born subject, who had been resident in *Surinam* and *St. Eustatius,* and had left those settlements with an intention of returning to this country, but had got no farther than *Holland,* the mother country of those settlements, when the war broke out; and it was determined by the Lords of Appeal that he was *in itinere,* that he had put himself in motion, and was in pursuit of his native British character.

Sir *John Leach* seems to me to be incorrect also in saying that in the case of the abandonment of an acquired domicil there is no difference in principle between the acquisition of an entirely new domicil and the revival of the domicil of origin. It is said by *Story,* in sect. 47 of his Conflict of Laws, that "If a man has acquired a new domicil different from that of his birth, and he removes from it with an intention to resume his native domicil, the latter is re-acquired even while he is on his way *in itinere;* for it reverts from the moment the other is given up." This certainly cannot be predicated of a person journeying towards a new domicil which it is his intention to acquire.

I do not think that the circumstances mentioned by *Story* in the above passage, viz., that the person has removed from his acquired domicil with an intention to resume his native domicil, and that he is *in itinere* for the purpose, are at all necessary to restore the domicil of origin. The true doctrine appears to me to be expressed in the last words of the passage: "It" (the domicil of origin) "reverts from the moment the other is given up."

This is a necessary conclusion if it be true that an acquired domicil ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicil. The domicil of origin always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist. This appears to me to be the true principle upon this subject, and it will govern my opinion upon the present appeal.

Upon the question whether Colonel *Udny* ever acquired an English domicil which superseded his domicil of origin, there can be no doubt that his long residence in *Grosvenor Street* for the space of thirty-two years from 1812 to 1844, is calculated to produce a strong impression in favor of the acquisition of such a domicil. Time is always a material element in questions of domicil; and if there is nothing to counteract its effect, it may be conclusive upon the subject. But in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to shew that however long a residence may have continued no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil. As already shewn, the domicil of origin remains till a new one is acquired *animo et facto*. Therefore, a wish or a desire expressed from time to time to return to the place of the first domicil, or any looking to it as the ultimate home, although wholly insufficient for the retention of the domicil of origin, may yet amount to material evidence to rebut the presumption of an intention to acquire a new domicil arising from length of residence elsewhere. In this view it would be a fair answer to the question, Did Colonel *Udny* intend to make *England* his permanent home? to point to all his acts and declarations with respect to *Scotland* and his estates there, to the offices which he held, to the institutions to which he belonged, and to his subscriptions to local objects, shewing, that though his pursuits drew him to *England* and kept him there, and his circumstances prevented his making *Udny Castle* fit for his residence, he always entertained a hope, if not an expectation, that a change in his fortunes might eventually enable him to appear in his country of origin, and to assume his proper position there as a Scotch proprietor.

If the residence in *England* began under circumstances which indicate no intention that it was to be permanent, when did it assume the character of permanence by proof that the Colonel had intentionally given up his Scotch domicil and adopted a different one? It appears to me upon this question of fact, that throughout the whole of the Colonel's residence in *London* there was always absent the intention to make it his permanent home which is essential to constitute a domicil; residence alone, however long, being immaterial unless coupled with such intention. But even if it should be considered that Colonel *Udny's* residence in *England*, though not originally intended to be his permanent home, after a certain length of time ripened into a domicil, yet in 1844 he gave up the house in *Grosvenor Street* and returned to *Boulogne*, where he remained for nine years without any apparent intention of again taking up his residence in *England*. This abandonment of the English residence, both in will and deed, although accompanied with no immediate intention of resuming the Scotch domicil, put an end at once to the English domicil, and the domicil of origin *ipso facto* became the domicil by which the personal rights of Colonel Udny were thenceforth to be regulated.

This makes it unnecessary to consider what would have been the condition of the Respondent if his birth had taken place in *England* before the resumption of the Scotch domicil by Colonel *Udny,* and the subsequent marriage of his parents in *Scotland* after that domicil had been resumed. Because the domicil being Scotch, the place of the birth of the Respondent is wholly immaterial, and the case is completely governed by the authority of the cases of *Dalhousie* v. *McDouall* (7 Cl. & F. 817) and *Munro* v. *Munro* (Ibid. 842), in each of which the birth of the illegitimate child, and also the subsequent marriage of the parents, took place in *England,* but the domicil being Scotch it was held that neither the place of the marriage nor the place of the birth affected the *status* of the child.

The existence of the Scotch domicil renders it also unnecessary to consider whether the parents of the Respondent went to *Scotland* for the purpose merely of legitimating the Respondent by their marriage there, and deprives the case of *Rose* v. *Ross* (4 Wils. & Shaw, 289), which was insisted upon by the Appellant, of all application. For in that case, as stated by the Lord Chancellor, "the parties were domiciled in *England*, the child was born in *England,* the parties went to *Scotland* for the purpose expressly of being married, and having been married they returned to *England* to the place of their former domicil."

I agree with my noble and learned friend that the interlocutors appealed from ought to be affirmed.

LORD WESTBURY :—

The law of *England,* and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status;* another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicil of the mother if illegitimate. This has been called the domicil of origin, and is involuntary. Other domicils, including domicil by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice.

Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi,* can be inferred the fact of domicil is established.

The domicil of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party.

Domicil of choice, as it is gained *animo et facto,* so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicil remains until another is acquired. This is true if applied to the domicil of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicil of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicil has *animo et facto* been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domiciles himself in *Holland,* acquire and have the *status civilis* of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land, but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits *Holland,* declaring that he will never return to it again, and taking with him his wife and children, for the purpose of traveling in *France* or *Italy* in search of another place of residence, is it meant to be said that he carries his Dutch domicil, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity and, on the contrary, much reason, in holding that an acquired domicil may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicil of origin revives until a new domicil of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing lived for twenty years after he had finnally quitted *Holland,* without acquiring a new domicil, and afterwards died intestate, his personal estate would be administered according to the law of *Holland,* and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorized by one or more decisions involves absurd results, there is great reason for believing that no such rule was intended to be laid down.

In Mr. Justice *Story's* Conflict of Laws (the last edition) it is stated that "the moment the foreign domicil (that is the domicil of choice) is abandoned, the native domicil or domicil of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicil.

In adverting to Mr. Justice *Story's* work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed, "The result of the more recent English cases seems to be, that for a change of national domicil there must be a definite and effectual change of nationality." In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this House in the case of *Moorhouse* v. *Lord* (10 H. L. C. 272) when in speaking of the acquisition of a French domicil, Lord *Kingsdown* says, "A man must intend to become a Frenchman instead of an Englishman."

These words are likely to mislead, if they were intended to signify that for a change of domicil there must be a change of nationality, that is, of natural allegiance.

That would be to confound the political and civil states of an individual, and to destroy the difference between *patria* and *domicilium.*

The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel *Udny,* the consul at *Leghorn,* and afterwards at *Venice,* and again at *Leghorn,* did not by his residence there in that capacity lose his Scotch domicil. Colonel *Udny* was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel *Udny* married, and (to use the ordinary phrase) settled in life and took a long lease of a house in *Grosvenor Street*, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel *Udny* deliberately chose and acquired an English domicil. But if he did so, he as certainly relinquished that English domicil in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving *London* in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicil he abandoned it absolutely *animo et facto*. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to *Boulogne*, and at the same time his domicil or origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of *Scotland*, the country of his domicil.

LORD COLONSAY:—

I regard this case as one of very considerable importance, inasmuch as it has afforded an opportunity for bringing out, more clearly than has been done in any of the former cases, the radical distinction between domicil of origin and domicil of choice. The principles of that distinction and the facts have been so clearly put before the House that I need do no more than express my concurrence.

JUDGMENT:—Ordered and Adjudged, that the said interlocutor of the Lords of Session in *Scotland*, of the Second Division, of the 14th of December, 1866, complained of in the said appeal, be varied by substituting for the words "that he never lost his said domicil of origin" these words, "and that if such domicil of origin was ever changed, yet by leaving *England* in 1844 his domicil of origin reverted;" and that, with this variation, the said interlocutor be, and the same is, hereby affirmed, and that the said petition and appeal be, and the same is, hereby dismissed this House.

Solicitors for the Appellant: *Coverdale, Lee, Bristow & Withers.*
Solicitors for the Respondent: *White, Broughton, & White.*

IN RE CAPDEVIELLE, 2 H. & C. 985, (1864).

The testator, Domingo Capdevielle, was the son of French parents, and was born towards the end of the last century at Montory in France. In the year 1807 he went to Cadiz in Spain where he was clerk to a merchant. He afterwards went to Gibraltar. In the year 1830 he came to England and carried on business as commission agent at Manchester until his death in 1859. During all that time he resided in lodgings for which he paid a weekly rent, and further weekly sum for his board. In 1835 he visited Montory, and again in 1846, when he passed a solemn act before a notary for the preservation of his co-hereditary rights of succession to a property there. He also then purchased a house and land at Montory, and desired that some apartments in the house should be kept ready for his return. He frequently expressed an intention to return to his native country. He devised all his real and personal property to his nephew in England. He had no real property in England, but a large amount of personal property consisting of cash and railway shares.

Martin, B.—The judgment which I am about to deliver is that of my brother Channell and myself.

There are two questions in this case. First, was the testator Domingo Capdevielle domiciled in England? This is a question of fact to be determined upon affidavits which have been produced by the executor, and which I think we are bound to consider as substantially true; we have no reason to suppose they are otherwise. They state that the testator was born in France, and left that country prior to the year 1807 or 1808 to avoid the conscription. He first went to Spain; from thence to Gibraltar, and in 1830 came to England and commenced the business of a commission agent at Manchester, and continued it until the 6th January, 1859, when he died. He was twice in France during that period and purchased some real property there. I think it is the true and fair inference from the affidavits that during the whole time his mind and intention was to return to France and die there, although he never determined or fixed upon any period when his return should take place, and that he was living in Manchester with the intention of remaining there for an indefinite period; but during all the time he had the hope and expectation and intention of returning to France and there ending his life; and that he always deemed and considered himself to be a Frenchman and not an Englishman.

The question whether he was domiciled in England depends upon what is the true definition of domicile in regard to testamentary acts. In Story's Conflict of Laws, c. 3, sec. 46, it is said that "if a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile notwithstanding he may entertain a floating intention to return (to his native country) at some future period." If this be the true definition of domicile the testator was domiciled in England, for he had removed to Manchester and lived there for twenty-nine years, his intention was to remain there for an indefinite time as his fixed permanent domicile; and although I believe he had always what may be called a floating intention to return to France at a future period, yet this, according to the above definition, would not prevent the English domicile. There are also two other definitions of domicile, one in the same work, c. 3, s.43, viz., "that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom;" the other is in Dr. Phillimore's Book on Domicile, c. c. 2, s. 15, p. 13, viz., "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." If these be correct the domicile of the testator was English. But on the other hand there is a definition of domicile by Lord Wensleydale, in Aikman *v.* Aikman, 3 Macq. 877, which, if correct, seems to me to establish that the domicile of the testator was

French. It is this:—"Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning his domicile of origin. This change must be animo et facto, and the burthen of proof unquestionably lies upon the party who asserts the change." Now, if this be the correct definition of domicile the testator's domicile was French, for I think the undoubted inference from the affidavits is that he never had the intention of abandoning his French domicile; on the contrary he always desired to retain it; and it may be predicated with absolute certainty that the Attorney-General did not establish the contrary. But it was said that Lord Wensleydale was not to be understood as intending what his words seem to express; but it is to me clear from the case of Moorehouse v. Lord, 10 H. L. 272, decided last year, that Lord Wensleydale was understood by the noble and learned lords who delivered judgment there in the sense which his words naturally mean. The three lords who delivered judgment, Lord Cranworth, Lord Chelmsford, and Lord Kingsdown, all go into the question of domicile. Lord Cranworth clearly intimates that the old view as to domicile was not correct, and that modern improved views existed. He says (10 H. L. 283) in order to acquire a new domicile, &c., a man must intend "quatenus in illo exuere patriam." It is not enough if you take a house in another place, and that it is tolerably certain that you had better remain there all the days of your life. That does not signify. You do not lose your domicile of origin merely because you go to some other place that suits you better, unless you mean to cease to be a Scotchman and become an Englishman, or a Frenchman, or a German. In that case if you give up everything you left behind you and establish yourself elsewhere, you may change your domicile. It is therefore clear to my mind that Lord Cranworth entertained the view as to domicile which the words of Lord Wensleydale naturally and in their ordinary meaning import. Lord Chelmsford is, if possible, still more clear. After stating that two definitions of domicile which had been mentioned were in his opinion liable to exception, he proceeds: (Id. 285)—"The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been the deliberate choice of a permanent home. In a question of change of domicile the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired. It may possibly be of such a description as to show an intention to abandon the former domicile; but that intention must be clearly and unequivocally proved." He then clearly adopts Lord Wensleydale's definition as I understand it, and states it at length. Lord Kingsdown expressed his concurrence with the other judgments and added, (Id. 291), "Upon the question of domicile I would only wish to say that I apprehend that change of residence alone, however long and continued, does not affect a change of domicile as regulating the testamentary acts of the individual. It may be, and it is, a necessary ingredient; it may be, and it is, strong evidence of an intention to change the domicile, but unless, in addition to residence, there is *intention to change the domicile,* in my opinion no change of domicile is made." I adopt the definition of Lord Wensleydale. I think it is approved of by the three noble and learned lords whose opinions I have quoted; and as I think there is no evidence of intention of the testator to change his domicile, in my judgment the domicile of the testator was French.

The other point is, whether, assuming the domicile to be French, succession duty is payable. The argument on behalf of the executor is very clear and apparently cogent. The duty is claimed in respect of a legacy of personalty, the testator is to be taken as having a French domicile. The rule of law is, that "mobilia et personalia sequenter personam." It is said therefore to be the same as if the will had been made by a Frenchman who had never been out of France in his life, and all his personalty had been locally situated there. The House of Lords, in Thompson *v.* The Advocate-General, 12 Cl. & F. 1, acted upon this principle, and have conclusively decided that legacy duty is not payable in respect of the present bequest; and there is certainly no expression to be found in the Succession Duty Act to show an intention to alter the law. The House of Lords there put a limitation upon the words "every legacy given by any will of any person," and we are urged to put the same limitation upon the words "every disposition" in the 2d section of the Succession Duty Act.

On the other hand the case of Wallop's Trust, decided by the Lords Justices on the 11th March in the present year, was cited by the Attorney-General. It was the case of an appointment by will of personalty by the donee of a power domiciled in Jersey, the power being created by the will of a testator domiciled in England. The Lords Justices held succession duty to be payable. It was said that this case was not in point inasmuch as the legacy was under a power and took effect by virtue of the will of a testator who was domiciled in England. Lord Justice Turner, however, stated in the most express and direct terms that this was not the ground of his judgment, and that in his opinion the legatees of persons domiciled out of Great Britain, and the appointees of donees of powers so domiciled, were intended to be and were subject to succession duty by the second section of the Act.

This case is in substance in point, and I think we ought to be bound by it; and if it be wrong it ought to be set right by a Court of appeal, and not by one of co-ordinate jurisdiction.

Bramwell, B.—I agree that the Crown is entitled to duty. With respect to the first point, I cannot say that I dissent from the reasons given by my Brothers Martin and Channell for their judgment, because I am unable to form an opinion on the subject to which I can attach any value, and therefore I am disposed to subscribe to that expressed by Judges whose opinions I so much respect. I wish, however, to state the reason of my difficulty.

Here a question arises on an English Act of Parliament, whether certain personal property is liable to legacy duty; and that depends on whether or no the testator was domiciled in England. I concur with my brother Martin in his appreciation of the facts with reference to the question involved. The word "domicile" is not to be found in the statute, but if by authoritative decision its operation is limited to cases where a testator was domiciled in England, no doubt our duty is simply to ascertain whether or no there has been an English domicile. To my mind that must always be a matter of great uncertainty, on account of the extreme difficulty in saying what constitutes an English domicile. Every definition, except one, of the word "domicile" would comprehend this case, and render the testator domiciled in England, and all the authorities relating to Anglo-Indian domicile point in the same direction. The only authority to the contrary is the decision of the House of Lords in Moorehouse *v.* Lord, 10 H. L. 272. No doubt the judgments pronounced by the noble and learned lords in that case, and the expressions of Lord Wensleydale in Aikman *v.* Aikman, 3 Macq. 877, tend to show that the testator had not acquired an English domicile, because, according to my appreciation of the facts, he always had the intention, hope, and expectation of returning to France, and perhaps of there ending his days. If I felt satisfied that this case was concluded by the decision of the House of Lords in Moorehouse *v.* Lord, of course I should trouble myself with no further reasoning about it, but follow, as I am bound to do, that decision. But in my opinion there are two difficulties in reference to it. One is that it is inconsistent with the former cases respecting Anglo-Indian domicile, and yet it does not expressly overrule them, or even notice them. The other is that the expressions used appear to me, with great deference, far too extensive. To say that a man cannot abandon his domicile of origin without doing all that in him lies to divest himself of his country, is a proposition which, with great submission, I think cannot be maintained. In the ordinary case of an Irish or English labourer emigrating to the United States of America, without any hope or intention of ever returning, but not naturalizing himself for fear of being subject to conscription; ready to claim the protection of the British Ambassador to prevent his being made a conscript, but having no desire or intention whatever to remain a

British subject; I think that, if he died in America, it could scarcely be argued, that America was not his place of domicile, although he had not done all that in him lay to abandon his native country. Therefore, assuming those noble and learned lords intended to overrule previous cases, I have great difficulty in supposing that they intended everything which would be comprehended within the very extensive expressions they used.

That being so, I cannot help referring to the Act of Parliament; and, as I before observed, the word "domicile" is not found in it. The Act imposes a duty on *every legacy,* but the general words of the Act must be restricted to that which is properly the subject of a British legacy, that is to say, British personal property, and cannot apply to a foreigner, or an Englishman in the position of a foreigner, that is, domiciled abroad. I am content to suppose the rule of law reasonable, that personal property, having no situs, follows the domicile of its owner. But here is the case of a Frenchman who left his native country more than half a century ago, and who lived for nearly thirty years in England, where he attained an old age, whose place of business was in England, who made his property in England, and invested the greater part of it there, who made a will in England which required probate in a Court in England, and who left property to a legatee residing there. Then why should not that property be subject to legacy duty, the legatee being in England and taking the property here under English authority? I own I cannot see why it should not; and acting on my own unassisted judgment I should have been unable to come to the conclusion that the property was not subject to legacy duty because the testator was a Frenchman, and ought to be treated in the same way as a person who had never been in England and had no property here. I have considerable difficulty, either looking at the reason of the thing, or in the belief that the Anglo-Indian cases are overruled; whilst, on the other hand, I have a difficulty the other way, on account of the extensive expressions used by the noble and learned lords in Moorehouse *v.* Lord.

But then it is said that if the property is not liable to legacy duty it is liable to succession duty; and cases have been cited in support of that position. Although I have great faith in, and respect for, the authority of the learned Lord Justice who pronounced an opinion in accordance with that view (which was certainly not heartily concurred in by his learned coadjutor), I confess I have great difficulty in following that authority, for this reason, that whatever arguments can be used for the purpose of showing that legacy duty is restricted to persons and property the subject of British legislation, so as to exonerate persons in a case like this, are equally applicable to succession duty, and the Succession Duty Act equally requires some limitation in its application as the Legacy Duty Acts; because to my mind everything that is true of the one is equally true of the other. There is the same difficulty in applying the Succession Duty Act to *all* persons *everywhere,* whether domiciled in England or not, as there is in the case of the Legacy Duty Acts; and I cannot see why the same reasoning should not apply to the one as the other. I say most unfeignedly, though I have thought it right to give expression to the doubt I entertain, I feel myself so embarrassed in forming an opinion that while I certainly agree in the conclusion at which my Brothers Martin and Channell have arrived, I cannot say I differ even in the reasons they have given for it.

POLLOCK, C. B.—I agree that the Crown is entitled to duty; but the grounds of my decision are not the same as those stated by the other members of the Court. I think that the argument of the Attorney-General is well founded, and he established to my satisfaction that if the question now arose for the first time we should not be wrong in deciding that the testator, a Frenchman, who had resided in England a considerable number of years and amassed his property here, was domiciled in England; and therefore on his death his property was liable to be distributed according to the law of England, and was subject to legacy duty. I am not satisfied, however, that such a decision would be in accordance with some recent authorities. Nevertheless, I entertain a very clear view of the grounds on which my opinion is founded, and in the result concur with the other members of the Court. I own that if I were to express all the doubts to which this question gives rise, I should require considerable time to state them at length.

The question of domicile is a very large one, and it is not easy to ascertain affirmatively all that belongs to it, particularly when applied to English law. It is somewhat remarkable that "domicile" is now very frequently the subject of discussion in our Courts, and, as we have more than once observed, the word is comparatively entirely new to the English law, for neither it nor the notion it conveys belongs to anything English. The word "domicile" is not to be found in Viner's Abridgment, Bacon's Abridgment, Comyn's Digest, or in English law books from Bracton down to Blackstone. An English subject is domiciled in every part of England; but that is not so in foreign countries where the law of domicile prevails. There a man is domiciled at the particular part of the dominions where he was born, and there are certain acts which he cannot perform unless at his place of domicile. The English law knows no such disability. A British subject may marry or make a will in any part of the British dominions. I think that for certain purposes a person may have more than one place of domicile. I apprehend that a peer of England, who is also a peer of Scotland, and has estates in both countries, who comes to Parliament to discharge a public duty and returns to Scotland to enjoy the country, is domiciled both in England and Scotland. A lawyer of the greatest eminence, formerly a member of this Court, and now a member of the House of Lords, to whose opinion I, in common with all the profession, attach the highest importance, once admitted to me that for some purposes a man might have a domicile both in Scotland and England. I cannot understand why he should not. Then why may not the same thing occur with reference to commerce, manufactures, or any other purpose? Suppose, for instance, a person born in England of French parents (and therefore a French subject, with an English domicile of origin), had a large commercial establishment in both countries, without any particular attachment to either, but only intending to make the most money he could in both. Why should he not, for the purposes of the particular establishment, be domiciled in both countries, so that his property in England would be administered according to the law of England, and his property in France according to the law of France? But somehow or other a notion has crept in that although there may be three sorts of domicile, as in France, there can be only one for the purpose of administering property in England. I cannot conceive what reason or necessity there is for any such distinction, and in the case which I have put I cannot understand why a person, for the purpose of commerce and manufacture, should not have a domicile both in England and France.

Now, the conclusion to which the authorities lead is, that the testator was domiciled in England. Where British subjects have settled in the East Indies and there realized a large personal property, it has been considered exempt from legacy duty because they have acquired what is called an Anglo-Indian domicile. But there can be no doubt that in every one of those cases the party intended to return to this country and here spend the remainder of his days. I very much doubt whether the noble and learned lords who, in the case of Morehouse *v.* Lord, expressed the opinions which have been adverted to, intended to say that the decisions with respect to Anglo-Indian domicile were wrong. The argument of the Attorney-General has satisfied me that the testator acquired an English domicile; at the same time I think that my learned brothers are correct in saying that the opinions expressed by the noble and learned lords who decided the case of Moorehouse *v.* Lord are calculated to convey the notion that the definition of Mr. Justice Story (Story on the Conflict of Laws, sec. 43, p. 53) is not correct, and that a new definition of domicile may be given and acted upon in this country. However, a judgment of the House of Lords is only binding so far as it necessarily determines some certain proposition; it is not binding as to the reasons given by each of the noble lords, even though they should all concur in giving the same. If, indeed, the reasons for a judgment are so interwoven with the decision as to form a necessary part of it, no doubt it is an authority which no one ought to treat lightly, and to which every Judge ought to defer if he can; but he is not bound to do so, though he is undoubtedly bound by the judgment, or what may be called its essence and principle. In the case of Moorehouse *v.* Lord I should have come to precisely the same conclusion as the noble and learned lords who decided it, without thinking it necessary to give a new definition, or to enunciate any doctrine to be regarded as a new and improved view of the law of domicile, as if Mr. Justice Story was no authority, and all the antecedent writers on the subject wrong. I own I am not of that opinion. In my judgment the definition of Mr. Justice Story is for all practical purposes far more reasonable than any other that I am aware of. Seeing that the definition given in Moorehouse *v.* Lord was not necessary for the decision of that case, I am not disposed to adopt it in this. I am rather disposed to adopt the argument of the *Attorney-General,* and agree with him that the testator was domiciled in England, and therefore his personal property is liable to legacy duty.

But it was further argued, on the part of the Crown, that assuming the testator was domiciled in France, and his property exempt from legacy duty, the case of In re Wallop's Trust is an authority that it is liable to succession duty. I think that the opinions of the learned Judges of the Court of Appeal in Chancery are entitled to the greatest respect, but that Court is not, in matters of revenue, a Court of co-ordinate jurisdiction with this Court. I own that if in this case there had been a French domicile I should have entertained considerable doubt whether the property was liable to succession duty. But I so far respect the opinions of the learned Judges who decided Wallop's Case that I should be disposed to adopt their view. But whether we take one view or the other, according to the decision of the Lords Justices the Crown is entitled to duty; and if the Attorney-General is right in saying that the domicile was English, which I think is really the correct view, there can be no doubt on the subject. I therefore agree with the rest of the Court that the Crown is entitled to duty; at the same time I have thought it right to make these remarks, because there are principles involved in our decision which I think by no means free from doubt.

Cause shown for non-delivery of the account and non-payment of the duty and costs, disallowed; and order for payment of the duty and costs.

DOMICIL IN UNCIVILIZED COUNTRIES.

DICEY CONFLICT OF LAWS, APPENDIX, NOTE 1.*

THE Rules in this Digest apply only to rights acquired under the law of a civilised country. What, however, is the law, if any, which in the opinion of English Courts governs transactions taking place in an uncivilised country, *e. g.*, in the Soudan, or in some part of the world not under the sovereignty of any ruler recognised by European law?

The question is one which may at times come before an English Court; it is also one to which, in the absence of decisions, nothing like a final answer can be given; all that can be done is to note a few points, as to the matter before us, on which it is possible to conjecture, at any rate, what would be the view taken by English Courts.

We may assume that the legal effect of a transaction taking place, *e. g.*, a contract made, in an uncivilised country could not come before an English Court unless one of the parties at least were the subject of some civilised state.

(1) *As to domicil.*—An Englishman—and probably the citizen of any civilised country—does not, it would seem, by fixing his permanent residence, or settling in an uncivilised country, acquire, for legal purposes, a domicil in such country. A domiciled Englishman who settles in China, and *a fortiori* who settles in a strictly barbarous country, retains his English domicil. *A*, an Englishman, was settled at Shanghai. "In these circumstances it was admitted by the petitioner's counsel [in a case as to liability to "legacy duty] that they could not contend that the testator's domi"cil was Chinese. This admission was rightly made. The differ"ence between the religion, laws, manners, and customs of the "Chinese and of Englishmen is so great as to raise every presump"tion against such a domicil, and brings the case within the prin"ciples laid down by Lord Stowell in his celebrated judgment in "*The Indian Chief* [1801, 3 Rob. Ad. Cas. 29], and by Dr. Lush"ington in *Maltass v. Maltass*" [1844, 1 Rob. Ecc. Cas. 67, 80, 81]. (*In re Tootal's Trusts*, 1883, 23 Ch. D. 532, 534, judgment of

---

*This "note" is inserted by permission of the American publisher of "Dicey on the Conflict of Laws."

Chitty, J. Semble, however, that the cases do not show that an Englishman might not for legal purposes acquire a domicil in such a country as China. All they actually establish is the strength of the presumption against his intending to acquire a domicil in China, or rather to subject himself to Chinese law.)

The principle laid down or suggested in these words by Mr. Justice Chitty—namely, that settlement in an uncivilised country does not change the domicil of the citizen of a civilised country, or at any rate of a domiciled Englishman—goes (if it can be maintained) some way towards solving one or two difficult questions, *e. g.,* What is the law governing the validity of a will made in an uncivilised country by an Englishman domiciled in England?

(2) *As to marriage.*—A marriage made in a strictly barbarous country between British subjects, or between a British subject and a citizen of a civilised country, *e. g.,* an Italian, and it would seem even between a British subject and a native of such uncivilised country, will, it is submitted, be held valid as regards form, if made in accordance with the requirements of the English common law; and it is extremely probable that, with regard to such a marriage, the common law might now be interpreted as allowing the celebration of a marriage *per verba de præsenti* without the presence of a minister in orders. A local form, also, if such there be, would seem to be sufficient, at any rate where one of the parties is a native. It is, however, essential that the intention of the parties should be an intention to contract a "marriage" in the sense in which that term is known in Christian countries, *i. e.,* the union of one man to one woman for life to the exclusion of all others. Capacity to marry would apparently depend upon the law of the domicil of the parties, or perhaps more strictly of the husband.

(3) *As to contract.*—Capacity to contract must, it would seem, depend upon the law of the domicil of the parties to the agreement. If either of the parties were under an incapacity by the law of his domicil to enter into a contract, an agreement made by him in an uncivilised country would probably not be enforceable against him in England. This we may be pretty certain would be the case were the party under an incapacity an English infant domiciled in England.

The formalities of a contract probably, and its effect almost certainly, would, under the circumstances supposed, be governed by the proper law of the contract, *i. e.*, by the law contemplated by the parties. Suppose *X* and *A* enter into a contract in the Soudan. If the contract is to be performed in England, the incidents would be governed by English law; whilst, if it is to be performed in Germany, its incidents would be governed by German law.

(4) *As to alienation of movables.*—If the movables are at the time of the alienation situate in the barbarous country, probably English Courts might hold that the alienation must, in order to be valid, be one which, if made in England, would be valid according to the English common law. There is little doubt that if, though the alienation takes place in an uncivilised country, the movables alienated are situate in a civilised country, the validity of the alienation would depend on the law of that country (*lex situs*).

(5) *Torts.*—When an act which damages *A* or his property is done by *X* in a barbarous country, the character of the act cannot depend on the law of the country where it is done. If both *X* and *A* are domiciled in England, the act is probably wrongful and actionable in England, if it would have been tortious if done in England. If the two parties are domiciled, the one in England and the other, *e. g.*, in Germany, then the act is probably actionable in England, if it be one which is wrongful both according to the law of England and according to the law of Germany. But we can here be guided by nothing but analogy, and all we can do is to consider how far the rules which govern the possibility of bringing an action in England for a tort committed in a foreign and civilised country can by analogy be made applicable to an action for a tort committed in an uncivilised country. An action cannot be maintained in England for a trespass to land in an uncivilised country.

(6) *Procedure.*—An action in England in respect of any transaction taking place in an uncivilised country is clearly, as regards all matters of procedure, governed by English law.

On most of the points, however, considered in this Note, and many others which might suggest themselves, we must trust wholly to conjecture, and must admit that what is the law, if any, governing transactions taking place in an uncivilised country, is in many instances a matter of absolute uncertainty. If, for example, *X*, an Englishman domiciled in England, whilst in an uncivilised country promises *A*, a Scotchman domiciled in Scotland, out of gratitude for some past service, to pay *A* £10 on their return home, is the promise governed by English law, and therefore invalid for want of a consideration, or by Scotch law, under which, apparently, it may be valid? How, again, if the position of the parties had been reversed, and the promise had been made by *A*, the Scotchman domiciled in Scotland, to *X*, the Englishman domiciled in England? To these and similar inquiries no certain reply is, it is conceived, possible.

REVERTER OF DOMICIL.

BANK V. BALCOM, 35 CONN. 351, (1868).

BILL of interpleader, brought to the Superior Court in New Haven County, against Henry A. Balcom, administrator upon the estate of Abby M. Lewin, and Luzon B. Morris, administrator upon the estate of Frederick D. Lewin, her husband, praying that the respondents might interplead and have adjudicated their respective rights to certain bonds, formerly the property of the said Abby, which were held by the plaintiffs and to which each of the respondents made claim. The respondents filed answers respectively, and the case was referred to a committee, who made the following report of the facts in the case.

Frederick D. Lewin was born in Johnsbury, in the state of New York, in the year 1834, where his parents then resided. His father, who was an alien born, has continued to reside in the state of New York to the present time. Leaving that place in his childhood he subsequently resided, by successive changes of residence, in various states and places, until June 5th, 1861, when being then temporarily resident in Middletown in this state, he there married Abby M. Eddy, the person specified in the petition as Abby M. Lewin. He derived no support from his father after about the age of fourteen years. Immediately after their marriage Mr.

Lewin and his wife took up their residence in the state of Missouri. In the spring of 1862 they changed their residence to Bethel in this state, where they coninued to reside until 1864. Then abandoning that residence they removed, after a short stay at Middletown, to Branford in this state, where Mr. Lewin took up his residence in the summer or fall of 1864, and became rector of a church in that town.

In July, 1865, while Mr. Lewin and his wife were residing in Branford, a brother of his wife died, and subsequently, while they were still residing in Branford, she, Abby, received from the estate of her brother, by bequest from him, the sum of three thousand dollars, as her own proper estate; which sum she deposited personally in the First National Bank of New Haven, on the 7th day of March, 1866, directing that the same should be entered to her credit upon the books of the bank; whereupon that amount was credited to her, in her own name by the bank.

On the 23d day of April, 1866, she personally directed the bank to invest a portion of the fund in bonds of the United States to the amount (not including premium) of $2,500; and thereupon, in obedience to her directions, the bank purchased such bonds, expending of said fund in the purchase thereof (including premium) $2,625. The bank regarded the bonds, at the time of the purchase, as her property, and set them aside in an envelope marked "U. S. Bonds, property of Mrs. Abby M. Lewin," and received no directions from Mr. Lewin and knew nothing of him, so far as the bonds were concerned, at that time.

Shortly after the purchase of the bonds, and about the 1st day of May, 1866, Mr. Lewin and his wife left Branford and went to Geneseo in the state of New York, where both of them remained until her death, which occurred on the 25th day of July, 1866. She died intestate and without issue.

Mr. Lewin left Branford with intent to abandon his residence at that place, and with no intention of returning there. He did not go to Geneseo with intent to adopt that place as a place of permanent residence. He and his wife being then in feeble health, he went with her to Geneseo for the purpose of spending the summer there in the house of his brother-in-law, in the hope that the health of himself and wife might be benefited by the change of air and the use of the water of certain mineral springs near Geneseo. At the time when he left Branford, and from that time until the death of his wife, he had no definite intentions in regard to the selection of any place as the place of his future residence. So far as he had any sort of intention on the subject, it was, during the whole time, an intention conditional and uncertain, whereby all decision in his mind upon the question was left in abeyance, to be determined in the future by the turn which his wife's disease might take, and by other circumstances which might or might not arise.

About the 1st of August, 1866, Mr. Lewin left Geneseo and went to Windham, in this state. It does not appear, and is not found, that at that time he had decided in his own mind where he would take up his residence; but during his subsequent stay in Windham he did make up his mind upon the subject, and determined upon Windham as the place of his residence,—regarding it as his home and making preparations to go into business there. On the 3rd day of January, 1867, he died at Windham, intestate and without issue, being then, and having for some time previously been, resident and domiciled at Windham. He was buried at Geneseo at his request.

While Mrs. Lewin was living at Geneseo she drew from the bank, without any intervention of her husband, sums amounting in all to $400,—the last of which sums was paid to her on the 14th day of July, 1866.

On the 23rd of July, 1866, Mr. Lewin sent to the president of the bank a letter, enclosing another letter, both of which are given below. They were both written by him, except that the signature of the enclosed letter was subscribed by Mrs. Lewin with her own hand. She was then in a very feeble condition and was near her death, but, in the absence of all satisfactory proof to the contrary, it appeared, and is therefore hereby found, that she was intelligently aware of the contents of the letter when she so signed it, and that her signature was her own free act. The letters were as follows:

"Geneseo, July 23rd, 1866. Hon. H. M. Welch, Dear Sir, I enclose a note from Mrs. Lewin with regard to transferring her account at bank from her name to mine. She is very ill indeed and will be *in need of* money from time to time. By slow degrees she managed to complete her short note, with a feeble, trembling hand. Please send the balance of which you speak at once, and *sell* one of the bonds. Mrs. Lewin is so very low, and is such a sufferer, that I am very much alarmed for the result. Please let me hear from you at your earliest convenience. Direct to "Rev. F. D. Lewin." With many thanks for your kindness, I am, Very truly yours,

F. D. LEWIN."

"Geneseo, July 23rd, 1866. Hon. H. M. WELCH, Dear Sir. My health is so much worse that I fear I may not be able to draw for money when needed. I desire therefore to have whatever bonds or money there may be in my name transferred to that of my husband, Rev. F. D. Lewin, and you are hereby authorized and requested to make such transfer. Many thanks for your kindness. I trust that this is all that is necessary legally. Your truly,

ABBIE M. LEWIN."

In obedience to the directions of these letters, the bank, on the 28th day of July, 1866, sold one of the bonds and remitted the proceeds thereof to Mr. Lewin; and subsequently, in obedience to directions received from him, sold some of the bonds, from time to time, and remitted to him the proceeds thereof; so that, on the first day of November, 1866, the balance of the original fund remaining in the hands of the bank, consisted of two bonds of the United States, one for $1,000 and one for $500, which the bank has ever since held, and still holds awaiting the result of the present suit.

At various times after the death of his wife, Mr. Lewin, in conversation with persons related to his wife by marriage, disclaimed all right to use the fund except for the purpose of defraying his wife's funeral expenses and erecting a monument to her memory; but he did, nevertheless, in fact, from time to time after his wife's death, draw upon the fund to an amount exceeding $1,000, the principal part of which amount he did not use for the purpose of defraying her funeral expenses and for a monument, but for his own personal purposes.

At all times prior to the receipt of the two letters above mentioned the bank received and obeyed, in reference to the fund, the orders of Mrs. Lewin only; and afterwards, until the death of Mr. Lewin, received and obeyed, implicitly, his orders in relation thereto.

On the 30th day of March, 1867, William Lewin, of Buffalo, in the state of New York, father of said Frederick, took out letters of administration upon his estate, in due form of law in the surrogate's court for the county of Livingston, in that state, within which county Geneseo is situated.

On the 17th day of April, 1867, letters of administration were issued by the court of probate for the district of New Haven, upon the estate of Frederick, to Luzon B. Morris, respondent, and on the 6th day of February, 1867, letters of administration were issued by said last named court to Henry A. Balcom, respondent, upon the estate of said Abby, the decree in each case describing the intestate as late of Geneseo in the state of New York and as having property in this state within the jurisdiction of the court.

Upon these facts the case was reserved for the advice of this court.

C. R. Ingersoll, for the respondent, Balcom.

Morris, for himself.

Park, J.—The principal question in this case is in regard to the domicil of Mrs. Lewin at the time of her death. She died in the state of New York, and the administrator of her estate claims that her domicil at the time was in Connecticut; while the administrator of the estate of her husband claims that it was in the state of New York.

It appear by the finding of the court that her husband was a native of the state of New York; that he married Mrs. Lewin while temporarily residing in Connecticut; that immediately after their marriage they went to the state of Missouri, and resided there till the spring of 1862, when they returned to Connecticut, and after residing at various places in the state, became permanently located in the town of Branford. While their domicil continued there, Mrs. Lewin received a bequest that had been left her by her brother. Sometime in the spring of 1866 Mr. Lewin and his wife left Branford with the intent to abandon his residence there, and went to Geneseo in the state of New York, where he remained till the death of his wife, which occurred in the month of July of the same year.

The character of Mr. Lewin's residence at Geneseo is thus described in the report of the committee. "He did not go to Geneseo with the intent to adopt that place as a place of permanent residence. He and his wife, being in feeble health, went to Geneseo for the purpose of spending the summer there in the house of his brother-in-law, in the hope that the health of himself and wife might be benefited by the change of air, and by the use of the water of certain mineral springs near Geneseo. From the time he left Branford until the death of his wife he had no definite intentions in regard to the selection of any place as the place of his future residence. So far as he had any intention on the subject it was, during the whole period of time, an intention conditional and uncertain, whereby all decision in his mind upon the question was left in abeyance, to be determined in the future by the turn which his wife's disease might take, and by other circumstances which might or might not arise."

In the month of August of the same year he left Geneseo and returned to Connecticut, and not long afterwards became permanently settled in the town of Windham. These facts render it apparently clear that Mr. Lewin was not domiciled in the state of New York at the time his wife died.

But it is claimed that, inasmuch as he was a native of the state of New York, and inasmuch as he left Branford with no intention of returning to that place to reside, and went to the state of New York, and remained there, in fact, for a time, no matter what the character of his abiding may have been, he became domiciled there, on the principle that a native domicil easily reverts. Would it be claimed that if Mr. Lewin had left Branford with the intent to take up his residence in the state of Ohio, and on his way sojourned a few days in the state of New York, that would be sufficient? And what real difference is there between that case and the present? In both cases Mr. Lewin had no intention of permanently remaining in the state of New York. All the difference there is consists in the fact, that in one case his mind is made up in regard to his future residence and in the other it is not. His abiding in both cases is temporary. We said in another case upon the present circuit, that a temporary residence did not change its character by mere lapse of time. Whether it is longer or shorter it is temporary still. But the principle that a native domicil easily reverts applies only to cases where a native citizen of one country goes to reside in a foreign country, and there acquires a domicil by residence without renouncing his original allegiance. In such cases his native domicil reverts as soon as he begins to execute an intention of returning; that is, from the time he puts himself in motiont *bona fide* to quit the country *sine animo revertendi*, because the foreign domicil was merely adventitious, and *de facto*, and prevails only while actual and complete. The Indian Chief, 3 *Rob. Adm. R.*, 17, 24; The Venus, 8 *Cranch*, 253, 280, 301; The State *v.* Hallett, 8 *Ala.*, 159; Case of Miller's Estate, 3 *Rawle*, 312, 319; The Ann Green, 1 *Gall.*, 275, 286; Catlin *v.* Gladding, 4 *Mason*, 308; Matter of Wrigly, 8 *Wend.*, 134, 140.

This principle has reference to a national domicil in its enlarged sense, and grows out of native allegiance or citizenship. It has no application when the question is between a native and acquired domicil, where both are under the same national jurisdiction. It was so held in the case of Monroe *v.* Douglas, 5 *Maddock*, 379. In that case the question was between the native domicil of a party in Scotland, and a domicil of residence acquired by the same party in India, and the Vice Chancellor said he could find no difference in principle between the original domicil of the party and the acquired one in India. See also 1 *American Leading Cases*, 742.

If this principle does not apply to the case in question, then it follows from this finding that Mr. Lewin had no domicil in the state of New York when his wife died, but his domicil at that time remained in the town of Branford, in accordance with the maxims that universally prevail in relation to this subject, that every person must have a domicil somewhere, that he can have but one domicil for one and the same purpose, and that a domicil once acquired continues until another is established. Abington *v.* North Bridgewater, 23 *Pick.*, 170; Thorndike *v.* City of Boston, 1 *Met.*, 242; Crawford *v.* Wilson, 4 *Barb.*, 504; Rue High, Appellant, 2 *Doug.* (*Mich.*) 515; Somerville *v.* Lord Somerville, 5 *Vesey*, 750; Greene *v.* Greene, 11 *Pick.*, 410; Walker *v.* Bank of Circleville, 15 *Ohio*, 288.

It is claimed further, that the bonds in question became the property of Mr. Lewin by *donatio causa mortis.* But it is clear that no gift was intended by Mrs. Lewin, as plainly appears by her letter to the officers of the bank, and besides, a gift of this nature must be made in contemplation of the approach of death and must be given to take effect only in case the donor dies. Raymond *v.* Sellick, 10 *Conn.*, 480. Nothing of this kind appears in the case.

Again, it is claimed that the court of probate for the district of New Haven granted letters of administration on the estate of Mr. Lewin as domiciled in the state of New York; and it is insisted that this is conclusive on the subject. But the judgment of a court of limited jurisdiction is never conclusive of a jurisdictional question. Its jurisdiction may always be controverted. Sears *v.* Terry, 26 *Conn.*, 273; Jochumsen *v.* Suffolk Savings Bank, 3 *Allen*, 87; 2 *Redfield on Wills*, 49.

We advise the Superior Court that the administrator of the estate of Mrs. Lewin is entitled to the property.

In this opinion the other judges concurred.

COMMERCIAL DOMICIL.

DICEY CONFLICT OF LAWS, APPENDIX, NOTE 4.*

I. PERSON'S CHARACTER DETERMINED BY DOMICIL.

In time of war the answer to the question whether a person is or is not to be considered an alien enemy is, in most cases at any rate, to be determined by reference, not to his nationality or allegiance, but to his trading residence or commercial domicil. Every person domiciled in a state engaged in hostilities with our own, whether he is a born subject of that state or not, is to be regarded as an alien enemy; and ,speaking generally, a person domiciled in a neutral country is to be regarded as for commercial purposes a neutral, even though he be in fact a British subject, or a subject of a state at war with England. "The position is a clear one, that "if a person goes into a foreign country, and engages in trade "there, he is, by the law of nations, to be considered a merchant of "that country, and a subject for all civil purposes, whether that "country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character during his residence "and occupation in an enemy's country." A person's character, in short, as a friend or enemy, is in time of war to be determined by what is termed his commercial domicil. Persons who are commercially domiciled in a neutral country are, as far as belligerents are concerned, neutrals; whilst, on the other hand, persons commercially domiciled in a hostile country are, whatever their nationality or allegiance, to be considered enemies, for "persons resident in a country carrying on trade, by which both they and the "country were benefited, were to be considered as the subjects of "that country, and were considered so by the law of nations, at "least so far as by that law to subject their property to capture by "a country at war with that in which they lived." Thus, if there be a war between England and France, a British subject residing and trading in France is an alien enemy; whilst a British subject or a French citizen who resides and carries on business in Portugal is, even though he may trade with France, a neutral.

---

*This "note" is inserted by permission of the American Publisher of "Dicey on the Conflict of Laws."

II. NATURE OF COMMERCIAL DOMICIL.

The nature of the trading residence or commercial domicil, which determines a person's friendly or hostile character in time of war, may be made clear by comparing such commercial domicil with the domicil properly so called, which is referred to in the body of this treatise, and is, in this Note, termed for the sake of distinction a civil domicil. Each domicil is a kind of residence, each bears a close resemblance to the other, but they are distinguished by marked differences.

(A) *Resemblance of commercial domicil to civil domicil.*—A trading or commercial domicil bears so close a resemblance to a civil domicil that it is often described in language which appears to identify the two kinds of domicil. Thus Arnould writes of the domicil which determines a person's character in time of war: "That is properly the domicil of a person where he has his true, "fixed, permanent home and principal establishment, in which, "when present, he has the intention of remaining (*animus manendi*), and from which he is never absent without the intention "of returning (*animus revertendi*) directly he shall have accomplished the purpose for which he left it;" whilst Duer states with regard to the national character of a merchant: "It is determined "solely by the place of his permanent residence. In the language "of the law, it is fixed by his domicil. He is a political member "of the country into which by his residence and business he is incorporated—a subject of the government that protects him in his "pursuits—that his industry contributes to support, and of whose "national resources his own means are a constituent part." Nor are the points in which the two kinds of domicil resemble each other hard to discern. They are each kinds or modes of residence. The constituent elements of each are, first, "residence;" secondly, a "purpose or intention" (on the part of the person whose domicil is in question) "with regard to residence." In spite, however, of the terms used by high authorities, and of the undoubted likeness between the two kinds of domicil, they are different in essential particulars.

(B) *Differences between civil and commercial domicil.*—The fundamental distinction between a civil domicil and a commercial domicil is this: A civil domicil is such a permanent residence in a country as makes that country a person's home, and renders it, therefore, reasonable that his civil rights should in many instances be determined by the laws thereof. A commercial domicil, on the other hand, is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicil is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicil is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there. From this fundamental distinction arise the following differences:—

(1) *As to residence.*—Residence in a country is in general *Prima facie* evidence of a person having there his civil domicil, but it is only *prima facie* evidence, the effect of which may be quite got rid of by proof that a person has never lived in the country with the intention of making it his permanent home. But residence is far more than *prima facie* evidence of a person's commercial domicil. In time of war a man is taken to be domiciled for commercial purposes in the country where he in fact resides, and, if he is to escape the effect of such presumption, he must prove affirmatively that he has the intention of not continuing to reside in such country. A long period further of residence, which, as regards civil rights, is merely evidence of domicil, might, it would seem, be absolutely conclusive in determining national character in time of war.

(2) *As to intention.*—The intention, or *animus,* which, in combination with residence, constitutes a civil domicil, is different from the intention or *animus* which, together with residence, makes up a commercial domicil.

The intention which goes to make up the existence of a civil domicil is the present intention of residing permanently, or for an indefinite period, in a given country. The intention which goes to make up the existence of a commercial domicil is the intention to continue residing and trading in a given country for the present. The former is an intention to be settled in a country and make it one's home, the latter is an intention to continue residing and trading there. Hence, on the one hand, a person does not acquire a civil domicil by residence in a country for a definite purpose or period, and cannot by residence in one country, *e. g.,* France, get rid of a domicil in another, *e. g.,* England, if he retains the purpose of ultimately returning to England, as his home; while, on the other hand, the intention "which the law attributes to a person "residing in a hostile country, is not disproved by evidence that he "contemplated a return to his own country at some future period. "If the period of his return is wholly uncertain—if it remains in "doubt at what time, if at all, he will be able to accomplish the de-"sign,—the design, however seriously entertained, will not avail "to refute the legal presumption. A residence for an indefinite "period is, in the judgment of law, not transitory, but permanent. "Even when the party has a fixed intention to return to his own "country at a certain period, yet if a long interval of time—an "interval not of months, but of years—is to elapse before his plan "of removal can be effected, no regard will be had to an intention "of which the execution is so long deferred."

D, domiciled in England, goes to British India with the full intention of residing there till he has made his fortune in trade, and of then returning to England, where he has his domicil of origin. He resides in India for twenty years. He retains his English civil domicil. Suppose, however, that *D,* under exactly similar circumstances in every other respect, takes up his residence not in British India, but in the Portuguese settlement in India, and after war has broken out between England and Portugal, continues to reside and trade in the Portuguese settlement, though still retaining his intention of ultimately returning to England. *D* thereupon acquires a Portuguese commercial domicil.

(3) *As to abandonment.*—The rules as to abandonment are different. A civil domicil once acquired can be changed only by complete abandonment in fact of the country where a person is domiciled. The intention to change, even if accompanied by steps for carrying out a change, will not, it would seem, produce a change as long as the person whose domicil is in question continues in fact to reside in the country where he has been domiciled.

A commercial domicil in time of war can, it would seem, be changed, under some circumstances, by the intention to change it, accompanied by steps taken for the purpose of effecting a change. "The native national character, that has been lost, or partially sus-"pended, by a foreign domicil, easily reverts. The circumstances, "by which it may be restored, are much fewer and slighter than "those that were originally necessary to effect its change. The "adventitious character, that a domicil imposes, ceases with the "residence from which it arose. It adheres to the party no longer "than he consents to bear it. It is true, his mere intention to remove—an intention not manifested by overt acts, but existing secretly in his own breast, . . . is not sufficient to efface the character that his domicil impressed; something more than mere "verbal declarations, some solid fact, showing that the party is in "the act of withdrawing, is always necessary to be proved; *still, "neither his actual return to his own country, nor even his actual "departure from the territories of that in which he resided, is indispensable."*

(4) *As to domicil by operation of law.*—It may fairly be doubted whether the rules as to domicil by operation of law, *e. g.* in the case of persons who have in fact no home, or of dependent persons, which play so large a part in the law of civil domicil, can be without considerable limitations applied to the ascertainment of commercial domicil. *D*, for example, is a French subject, whose domicil of origin is English. He has an acquired domicil in France. Both France and America declare war against England. *D* thereupon leaves France, intending to settle in New York. He resumes during the transit from one country to another his domicil of origin; but it can hardly be supposed that he is not during such transit an alien enemy. *D*, again, is an infant, or a married woman, carrying on a commercial business on his or her own account in France during a war with England. It can hardly be maintained that the fact of the father in the one case, or the husband in the other, having an English domicil and being resident in England will free *D* from the character of an alien enemy.

(5) *As to special rules.*—There are one or two rules as to commercial domicil which can have no application to an ordinary civil domicil. Thus, according to American decisions at least, an American citizen (and the same principle would perhaps be applied by English Courts to British subjects) cannot, by emigration from his own country during the existence of hostilities, acquire such a foreign domicil as to protect his trade during the war

against the belligerent claims either of his own country or of a hostile power. So, again, a neutral merchant may, at any time withdraw his property and funds from a hostile country, and such a withdrawal may restore him to his neutral domicil. But whether the subject of a belligerent state can, after the outbreak of hostilities, withdraw from a hostile state so as to escape the imputation of trade with the enemy is doubtful. If the withdrawal can be effected at all, either it must be done within a short period after the outbreak of war, or any delay in effecting it must be shown to have arisen from necessity or from compulsion.

III. PERSON'S CIVIL NEED NOT COINCIDE WITH HIS COMMERCIAL DOMICIL.

From the distinctions between a civil and a commercial domicil, the conclusion follows that a person may have a civil domicil in one country, and, at the same time, a commercial domicil or residence in another. Thus, suppose that *D*'s domicil of origin is English, and that he goes to France and sets up in trade there without any purpose of making France his permanent home, but with the distinct intention of returning to England within ten years. He clearly retains his English domicil of origin; and the outbreak of a war between France and England does not of itself affect *D*'s civil domicil.

If *D* continues to reside and trade in France after the outbreak of hostilities, though without any change of intention as to the time of his stay in France, he will acquire a French commercial domicil. In other words, he will have a civil domicil in England and a commercial domicil in France.

Nor is this fact really inconsistent with Rule 3, that no person can, at the same time, have more than one domicil. It only illustrates the fact constantly dwelt upon in this treatise, that residence is different from domicil, and that a person while domiciled in one country may, in fact, reside in another.

DOMICIL OF MARRIED WOMEN.

MATTER OF FLORANCE, 54 HUN. (N. Y.) 328, (1889).

APPEAL from an order of the surrogate court of the county of New York, denying a motion made by the husband of Rosalie Florance, deceased, to vacate or set aside the probate of the will of the deceased or to modify the same, which order was entered April 24, 1889, in said surrogate's office.

George H. Yeaman, for the appellants.

Charles E. Miller, for the executors, respondents.

Edward W. Sheldon, for the United States Trust Company, as trustee under the will.

Meyer Butzel, special guardian.

VAN BRUNT, P. J.:

This application is a renewal of one made in June, 1888, pursuant to leave duly given.

It appears from the papers before the learned surrogate that the petitioner and appellant resides in the city of Philadelphia, State of Pennsylvania, and that he was the husband of Rosalie Florance, who died on October 12, 1887, in Europe. That in November, 1887, the last will and testament of said Rosalie was filed for probate with the surrogate of New York, and at the same time a petition was presented alleging that she had been, previous to her death, a resident of the county of New York. A citation was duly issued to and served upon all persons entitled to notice, including the petitioner, to attend the probate of the will. That the petitioner neglected to appear and the said will was admitted to probate and letters testamentary were issued thereon.

The petitioner stated in his petition that he did not attend the probate of the will because he did not suppose that any of his rights would be affected thereby, and that within a week or so after said probate the petitioner learned that said will had been improperly probated, in that the deceased was not a resident of New York at the time of her death, and he was advised by counsel that steps should be taken to modify and correct said probate. That thereupon, on June 21, 1888, a petition was presented to the Surrogate's Court upon which a citation was issued and such proceeding had, that, in October, 1888, the motion was denied, and that pursuant to leave granted, the petition in question was presented in December, 1888.

It further appeared that the petitioner and said Rosalie were married in the year 1860, in the city of New York, where she was born and had always resided up to the time of her marriage to the petitioner; that the petitioner and his said wife then went to live in Philadelphia, and resided there until 1873, when they broke up housekeeping and resided in various places. In the fall of 1875, the petitioner and his wife finally separated from one another, he making his home in Philadelphia, and she, with three children, in New York, she taking care of and maintaining them. The said Rosalie, from her savings of some property left her, accumulated some $60,000, which comprised her estate at her death.

The petitioner claims that as no legal separation had taken place between them, although they had lived apart for twelve years, the residence of his wife was that of her husband, viz., Pennsylvania, and that, by the laws of said State, he was entitled to share in her estate, which would not be the case were she a resident of New York.

The whole claim of the plaintiff is based upon the old rule that a woman by marriage acquires the domicile of her husband and changes it with him. It is admitted that a wife may procure a separate domicile for purposes of divorce, but it seems to be claimed that such domicile cannot be procured for any other purpose. The old rule in reference to a married woman's domicile cannot, certainly, prevail in view of the rights which are recognized to be hers by the statutes.

The property relations between husband and wife have been entirely changed since the rule in question has obtained, and the reasons for the rule no longer exist. The wife is now a distinct legal entity, having in the disposition of her property all the rights, and even more than a husband has ever possessed, and the husband has no control whatever over her movements or her disposition of her property. In the case at bar it appears that in 1875 the petitioner and his wife agreed to separate, she to take their children and maintain them. They did separate, he going to

Philadelphia and she living in New York, which had been her home before marriage, and supporting their children from her own means. There is no pretense that the petitioner ever contributed a cent to the support of his wife or their children since 1875, or offered to do so, and the best that he can say in his petition is that he never refused to provide a home for his said wife or her children in the city of Philadelphia. Probably he was never asked to do so, and, consequently, did not refuse, but he nowhere alleges that he offered to provide a home for his wife and children anywhere, and probably he did not.

They had agreed to live separate, and she had agreed to support herself and her children. She then, by and with his consent, acquired a domicile in New York, made that her home and that of her children, and certainly if she was enough of a resident to institute divorce proceedings, as is conceded, she is enough of a resident to leave her property to her children and to be protected from the claims of a husband with whom she has not lived for twelve years, and who has not, during that time, either contributed or offered to contribute to her support or to that of their children and who desires now, under a legal fiction, to take away from his own children a portion of their mother's inheritance.

The motion was decided correctly by the learned surrogate, and the order appealed from should be affirmed, with costs to each of the parties appearing as respondents.

DANIELS and BARRETT, JJ., concurred.

Order affirmed, with costs to each of the parties appearing as respondents.

DOMICIL OF INFANTS.

IN RE VANCE, 92 CAL. 195, (1891).

APPEAL from an order of the Superior Court of Sonoma County granting letters of guardianship.

The facts are stated in the opinion.

W. H. Barrows, and *Barham* & *Bolton,* for Appellant.

J. R. Leppo, for Respondent.

BELCHER, C.—On the 14th of October, 1890, Mrs. Mary L.

P. Mountjoy filed in the superior court of Sonoma County her petition praying that she be appointed guardian of the persons of Robbin and Stewart Vance. She stated in the petition that Robbin was a little girl about eight years old, and Stewart a little boy about five years old; that they were the children of John B. Vance and Louise F. Vance, but that the mother was dead; that she was the grandmother of the children, and that they had been living with her at Santa Rosa, Sonoma County, and in her care and custody, for several years; and that the father was not a fit or proper person to have the care and custody of them.

The father filed an answer to the petition, and denied that he was not a fit and proper person to have the care and custody of the children; denied that it was necessary that a guardian of the persons of the children should be appointed, inasmuch as he was their legal guardian; and alleged that the children were then, and had been since prior to the filing of the petition, inhabitants and residents of the city and county of San Francisco.

After a hearing, the court found, among other things, that the children had been residents of Sonoma County for more than four years last past, living with their grandmother, the petitioner, who had sole care and custody of them during that time; that on the twelfth day of October, 1890, the father, without the knowledge or consent and against the wishes of the petitioner, carried them away to San Francisco, where he resided; that the father deserted and abandoned the children more than three years previous to the time of his taking them from the custody of their grandmother; that he had not provided for their support for more than four years, and that his reputation was bad; and that the petitioner was a fit and proper person to have the custody of them.

An order was accordingly entered that letters of guardianship be issued to the grandmother as prayed for, and from this order the father appeals.

The principal contention of appellant is, that the court had no jurisdiction of the case, because, at the time the petition was filed, the children were not inhabitants or residents of Sonoma County, and hence that the order was void and should be reversed.

The evidence on which the order was based was as follows:

The petitioner introduced evidence showing that the mother of the children was her daughter, and had been dead about four years; "that several years prior to the death of their mother, the mother and the children lived with petitioner, and were wholly supported by the petitioner; that after the death of their mother, the children continued to reside with the petitioner and to be supported by her; that the father, Vance, has not provided for the support of the children since the death of the mother; that at various times since the death of the mother, Vance, the father, has expressed and declared to the petitioner that he was willing that she have the care and custody of the children; that at various times since the death of the mother, Vance had expressed and declared his intention of never reclaiming or taking the custody of the children from the petitioner; . . . that the reputation of J. B. Vance for sobriety, industry, and morality was and is bad, and has been for more than four years last past, and that he spent his earnings and money for liquors, on women, and general dissipation; that up to about one year ago, Vance, the father, resided in Santa Rosa, Sonoma County; that about one year ago he went to San Francisco, and since that time has resided in San Francisco; that after going to San Francisco to reside, he married, and for some time previous to the trial has lived with his wife in San Francisco; that on the twelfth day of October, 1890, Vance came to Santa Rosa, and went to the home of the petitioner, where the children were, and represented to the petitioner that he desired to take the children down town to get some candy, whereupon petitioner consented, and he took the children and went away with them, as the grandmother understood, to take them down town and get them candy; that Vance then took them to San Francisco without the knowledge and consent of the grandmother; that they were in San Francisco at the time these proceedings were commenced, and up to the trial thereof; that petitioner is able to maintain and care for the children."

The father then offered testimony showing that his residence had been in San Francisco for the year last past, and was at the time he took the children there, and "that his present wife, Mrs. J. B. Vance, had means with which to support and care for the children, and was desirous of caring for and supporting them."

In view of this evidence, we cannot say that the finding that the father had abandoned the children was not justified. He had left them for years to be supported and cared for by their grandmother, and had at various times declared his intention never to reclaim them. And that he recognized the grandmother's right to their custody will be presumed from the fact that he resorted to fraudulent means to get them away from her. If he had considered that he had a right at any time to take them away, presumably he would have asserted his right boldly, and no misrepresentations or deceit would have been used to accomplish his purpose.

The general rule is, that "the residence of the father during his life . . . . is the residence of the unmarried minor child." (Pol. Code, sec. 52, subd. 4.) But this rule does not apply when the child is under the age of fourteen years, and has been abandoned by the father. In such case he forfeits his guardianship of the child, and can no longer claim its custody. (Stats. 1873-74, p. 297.) If, then, these children had been abandoned by their father, as the court below found, their residence was in Sonoma County, and it was not changed by their surreptitious removal to San Francisco. The questions involved in the case were all questions of fact, which the court below was called upon and had a right to determine (*In re Danneker*, 67 Cal. 643), and we see no good ground for diturbing its conclusions. We advise that the order be affirmed.

FITZGERALD, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the order is affirmed.

DOMICIL OF INSANE PERSONS.

PITTSFIELD v. DETROIT, 53 ME. 442, (1866).

ON FACTS AGREED.

ASSUMPSIT to recover the amount paid for the support of an insane pauper in the insane hospital, from August 31, 1864, to Feb. 28, 1865.

The pauper was a single person, twenty-one years of age, and once had his settlement in Detroit. Nov., 1857, he removed to Pittsfield, where he continued to reside until Nov., 1859, when, upon due examination, being found insane, he was sent to the insane hospital, in Augusta, where he remained until Feb., 1865, when he died. The town of Pittsfield, being liable in the first instance, paid its legal proportion of his support in the hospital, from Aug., 1864 to Feb., 1865, his friends having paid the expenses which accrued prior to that time, the State also paying one dollar per week. The plaintiffs notified the defendants who answered denying settlement.

The Court was to enter nonsuit or default as the legal rights of the parties should require.

George W. Whitney, for the plaintiffs.

1. The pauper did not have his home in Pittsfield five successive years. When he went to the hospital he had no intention of returning, being incapable of having any intention. Although insanity will not prevent the acquisition of a settlement by the sixth mode, as by *Machias* v. *E. Machias,* 33 Maine, 427; *New Vineyard* v. *Harpswell,* 33 Maine, 193; *Gardiner* v. *Farmington,* 45 Maine, 537, still it is evident that the residence of an insane person must be actual and not constructive. Where an insane person actually dwells there he has his residence.

He was in the hospital against his will, and while there was incapable of gaining settlement anywhere.

2. State paid $1 per week after Nov., 1861. Such payment prevented Jenkins from gaining a settlement.

S. S. Hackett, for the defendants.

KENT, J.—The pauper commenced "to dwell and have his home" in Pittsfield, but, before he had so dwelt for five successive years, he was, on due proceedings, "committed to the insane hospital, by the selectmen of said town, as an insane person." He remained, under this commitment, in the hospital until he died. The time he remained in the hospital added to the time he had resided in Pittsfield, before entering it, made up more than five years. The question is, whether his home was, in legal contemplation, in that town whilst he was in the hospital as an insane man, or did he cease to have a continuing home there after his removal to that institution?

Certain general principles have been established by the decisions in our own Court, bearing more or less directly on this question.

When a residence is once established, an absence for a longer or shorter period for temporary purposes does not change such residence. To break up a residence once fixed, there must be a departure with an intention to abandon, or without an intention to return after a temporary absence. There are limitations and qualifications to be found in some of the cases, but in all of them the *intention* of the party is the controlling fact.

The objection made by the plaintiffs' counsel is, that, as the pauper was actually absent, he had no intention to return, because, being insane, he could have no intention on the subject. But another and preliminary intention is recognized by the law, viz., an intention to *remove,* and to abandon the residence. An insane man could no more have this intention, than he could have an intention to return.

In the case, as stated, this insane man did not even voluntarily remove. Without any assent or action on his part he was removed, by the action of the municipal officers of the town, to the hospital. It has been decided that he did not gain a residence in Augusta. *Smithfield* v. *Belgrade,* 19 Maine, 387; *Yarmouth* v. *N. Yarmouth,* 44 Maine, 352.

In the absence of all other facts, can a person, detained in the insane hospital, under the provisions of the law, be considered as having abandoned his home, or must he be considered as temporarily absent, and as still retaining his home where it was established when he was removed?

No one would probably raise any question in the case of a sane man, who should become a patient in a general hospital in another town or State, or in the case of a convict, committed to the State's prison, or county jail. A person has no residence in a public institution, as distinguished from a residence in some town. *Granby* v. *Amherst,* 7 Mass., 1; *Adams* v. *Wiscasset,* 5 Mass., 328.

If this pauper had recovered and returned to his home, before receiving any supplies as a pauper, could any one question his right to vote, at an election held within three months after his return? If it could be rightly questioned, then every patient, who is sent to the hospital, leaving a home and family, would lose his residence, and be remitted to a new commencing domicil upon his recovery and return to his home.

It has been settled, that a person becoming insane may gain a settlement by a residence commenced when sane, and continued for five years. *Machias* v. *East Machias,* 33 Maine, 427; *Gardiner* v. *Farmington,* 45 Maine, 537. Having commenced a residence when sane, it continues until abandoned or legally changed. We do not think that a person insane, sent by the officers of his town to the insane hospital, as a patient, thereby loses his residence and home before established in the town. It is worthy of consideration, although perhaps it does not alter the principle, that the establishment of the opposite doctrine would offer some temptation to town officers to send doubtful cases to the hospital, to prevent the gaining of a settlement by a person likely to become a pauper.

There is another point made by the counsel for the plaintiffs, viz.,—that the State having paid one dollar per week for a part of the time included in the five years, that payment must be considered as supplies to Jenkins as a pauper within the statute. This proposition cannot be sustained. The statute, by virtue of which this payment by the State was made, (R. S., c. 143, sec. 20,) expressly provides that such aid shall not be considered as supplies to a pauper. And further, a person is to be considered as receiving supplies as a pauper, within the meaning of rule 6th, c. 24, sec. 1, only when he receives such supplies from *the town* where he has his settlement, or where he is found in distress. *Opinion of Justices,* 7 Maine, 497; same in Mass., 11 Pick., 540, and 1 Met., 572; *Veazie* v. *China,* 50 Maine, 518; *Boston* v. *Westport,* 12 Pick., 16. *Plaintiffs nonsuit...*

APPLETON, C. J., WALTON, DICKERSON, BARROWS, DANFORTH and TAPLEY, JJ., concurred.

DOMICIL OF APPRENTICES.

MADDOX v. THE STATE, 32 IND. 111, (1869).

APPEAL from the Montgomery Common Pleas.

GREGORY, J.—Information against the appellant for illegal voting. It was charged that the appellant had not been a resident of the State for six months preceding the election at which he voted. The defendant pleaded not guilty. The case was submitted to the court; finding guilty; motion for a new trial overruled. The evidence shows that the defendant, when about nine years old, was apprenticed to one Miller, a resident of Montgomery county; that at that time he had neither father nor mother; that he made his home at Miller's until he was about nineteen, at which time he left, to go to Attica, in this State, where he fell in with a man going to Iowa, to whom he engaged himself as an assistant, in consideration of having his expenses paid to Iowa. He wrote letters to Miller, saying that he was going to Iowa to see the country, and that he intended to return as soon as he had accomplished that object. He remained in Iowa about three years. Soon after he came of age, he wrote to Miller, that as soon as he could get money enough to pay his expenses, he would return home. Whilst in Iowa, he worked for farmers on their farms, at different places. He said to a witness, after his return to this State, that he did not expect to remain. The court below, as we are informed by the bill of exceptions, found the defendant guilty on the ground that, being a minor during his stay with Miller, he could not gain a voting residence.

The residence of Miller, the master, was the residence of his apprentice, the appellant, for every purpose known to the law, and, whilst a minor, the apprentice could not by leaving his master and going to another state change that residence. But after the defendant arrived at full age, he could elect to change his residence, and whether he did or not in this case depended on his intention. If it was the intention of the appellant to return to this State, and he was only prevented from doing so by the lack of means to pay his expenses, and he did in fact return in accordance with his intention, then he never lost his residence in this state, although it was not his intention to remain here permanently. A mere intention, unaccompanied by a removal, will not lose a man his residence. The defendant never having actually left this State with an intention to change his residence, he was still a resident; and it took something more than a mere intention as to his *future* course to lose that residence.

The court erred in overruling the motion for a new trial.

Judgment reversed; cause remanded for a new trial, and for further proceedings.

L. Wallace, for appellant.

D. E. Williamson, Attorney-General, for the State.

DOMICIL OF SAILORS.

BANGS v. BREWSTER, 111 MASS. 382, (1873).

CONTRACT to recover the amount of a tax assessed by the defendants on the plaintiff, for the year 1869, and paid by him under protest. At the trial in the Superior Court, before *Brigham,* C. J. the following facts appeared:

The plaintiff was born in Brewster, and continued to reside there until 1867. He was a shipmaster, and arrived at Brewster from a voyage in July, 1867. In the following October, he became engaged to marry a woman who resided in Orleans, and previous to the engagement and until the marriage he made temporary visits to her in Orleans. In November he married her in Chelsea, went from Chelsea with his wife on November 12 on board his ship which lay at Boston, and thence to sea, first to San Francisco, and then to Liverpool. On his arrival in Liverpool, in December, 1868, he sent his wife, who was expecting to be confined, to her father's house in Orleans. She arrived there in February, 1869, and the plaintiff himself arrived in port and went to Orleans in the July following. He and his wife boarded at her father's about one month, and then went to Chelsea, where he established himself.

The plaintiff testified "that on his arrival home in Brewster, in 1867, he found his father dead, his father's house, where he made his home when ashore, burned, and his friends scattered; that having children, but no wife, he determined to abandon his domicil in Brewster, and told one of the assessors of Brewster that he must not tax him again; and that, upon his engagement to be married, he determined to make Orleans his home, and continued in that determination until after May 1, 1869." The defendants introduced evidence tending to contradict the plaintiff, and to show that he did not intend to make Orleans his home; and they contended that even if the jury should be satisfied that the plaintiff intended to make Orleans his home, as he testified, he had not shown such a personal presence in Orleans as would authorize the jury to find that he acquired a domicil there.

The defendant asked the judge to instruct the jury as follows: "If the plaintiff only went to Orleans for temporary visits to his intended wife, previous to November, 1867, when he went to sea, his subsequent sending of his wife to Orleans, where she boarded at her father's house, the plaintiff himself not going there until after May 1, would not justify the jury in finding a change of domicil to Orleans." "The plaintiff would not lose his residence in Brewster until he had gone to Orleans with a fixed purpose to make that his home."

The judge declined so to instruct the jury, and instructed them as follows: "The facts alone considered, that the plaintiff only went to Orleans for temporary visits to his intended wife, previous to November, 1867, when he went to sea, and subsequently sent his wife to Orleans, where she boarded at her father's house, the plaintiff himself not going there until after May 1, would not justify the jury in finding a change of domicil to Orleans, but these facts are to be considered as qualified or explained by the condition of his father's homestead, and of his family when he arrived at Brewster, his intentions then formed, his subsequent engagement to marry, the character of his visits to Orleans between October 1 and his marriage, and his occupation as master of a ship. The plaintiff, having his home for the purpose of taxation in 1867 in Brewster, retained that home until he left Brewster, intending not to return there to reside, and went to Orleans or some other town with an intent to have his home there for a definite or indefinite time, and his domicil would then be established in Orleans, or such other town, notwithstanding that while he thus resided in Orleans, or such other town, he was doubtful whether he might not, at a future time, return to Brewster, or go to some other town, and make his home there."

The defendant also asked the judge to instruct the jury that the plaintiff had not shown such a personal presence in Orleans as the law required in order to effect a change of domicil, but the judge refused so to instruct them.

The judge, against the defendants' objection, submitted the case to the jury upon the following questions, and instructed them that they should find for the plaintiff if they should answer either question in the affirmative. 1. "At the time when the plaintiff went to sea, November, 12, 1867, did he then definitely intend to make Orleans his home?" 2. "When the plaintiff sent his wife, in December, 1868, to Orleans, was it in pursuance of an intent to make Orleans his home?"

The jury answered both the questions in the affirmative; a verdict was returned for the plaintiff; and the defendants alleged exceptions.

G. A. King, (*H. P. Harriman* with him,) for the defendants.

J. Higgins, for the plaintiff.

MORTON, J.—The question at the trial was whether the plaintiff had on May 1, 1869, acquired a domicil in Orleans. There is no doubt as to the rule of law that the plaintiff's domicil of origin in Brewster adhered to him until he had acquired a domicil somewhere else, and that in order to effect a change of domicil he must not only have had the intent to make his home in some other town, but he must in fact have made his home there. The intent and the act must concur, and until the intent was consummated by an actual removal of his home, no change of domicil was effected. *Whitney* v. *Sherborn,* 12 Allen, 111. *Carnoe v. Freetown,* 9 Gray, 357.

The question is as to the application of this rule to the facts of this case. The plaintiff was a shipmaster, most of whose time was spent at sea. He went to sea in November, 1867, taking his wife with him, and in December, 1868, he sent his wife to Orleans, and she arrived there in February, 1869. He did not arrive at Orleans until July, 1869, so that he was not personally present in Orleans on May 1, 1869. The special findings of the jury settle conclusicely that when he went to sea in November, 1867, he had the definite intent to make Orleans his home, and that in December, 1868, he sent his wife to Orleans in pursuance of that intent. We think the jury were justified in finding that his domicil was in Orleans on the first of May.

By sending his wife to Orleans with the intent to make it his home, he thereby changed his domicil. The fact of removal and the intent concurred. Although he was not personally present, he established his home there from the time of his wife's arrival. We think the learned judge who presided at the trial rightly refused to rule, as requested, that the plaintiff had not shown such a personal presence in Orleans as the law required in order to effect a change of domicil, and that the instructions given upon this subject, when applied to the facts of the case, were correct.

The defendants object that the instruction that the jury should find for the plaintiff if they answered either of the questions submitted to them in the affirmative, was erroneous, upon the ground that it required the jury to find a change of domicil from proof of an intention to remove, without an actual removal. We do not deem it necessary to consider whether this objection is founded upon a just construction of the bill of exceptions taken as a whole, because the finding of the jury upon the second question renders the first immaterial. This finding settles that the plaintiff sent his wife to Orleans in pursuance of the intent then entertained to make it his home; and the question as to his intent at an earlier date, and its effect, becomes of no consequence to the rights of the parties in this suit. *Exceptions overruled.*

DOMICIL OF STUDENTS.

VANDERPOEL v. O'HANLON, 53 IOWA 246, (1880).

Appeal from Johnson Circuit Court.

TUESDAY, APRIL 6.

THE petition states that the plaintiff, in March, 1878, was a "legal voter and elector," and that being such he was entitled to vote in a certain ward in Iowa City, in Johnson county, at an election then being held. That defendants were judges of said election, and, against the protest of the plaintiff, required him to submit to an examination touching his right to vote, and required him to take a prescribed oath. Upon taking such oath he tendered his ballot to the defendants and demanded that it be deposited in the ballot-box, which the defendants unlawfully, corruptly and maliciously refused to do, to the great injury and damage of the plaintiff, for which he asked judgment. The allegations of the petition were denied; trial by jury; verdict for the plaintiff for three hundred dollars, for which judgment was rendered. The defendants appeal.

S. H. Fairall, Chas. Baker and *Geo. J. Boal,* for appellants.

Milton Remley and *S. M. Finch,* for appellee.

SEEVERS, J.—The material facts are, that in January, 1875, the plaintiff was nineteen years of age, and his home or residence was with his father in Mitchell county, in this State. At that time he was sent by his father to the State University at Iowa City for the purpose of completing his education, and was still attending said school in March, 1878, when he offered to vote. His father furnished the means required for the plaintiff's expenses and for the payment of such fees as were required at the University.

His father's home in Mitchell county was the plaintiff's "headquarters" or residence during vacations, except when he was absent from there on hunting or other excursions. At the time he offered to vote the plaintiff was unmarried and twenty-two years of age. In response to a question as to his intention to make Iowa City his home after he ceased to attend the University, the plaintiff, being then on the witness stand, answered as follows: "I didn't know what I would do after I had graduated. I was not aware that I would ever leave Iowa City. I did not know what I would do afterwards. I was at that time (when he offered to vote) without any intention." Whether the plaintiff was a legal voter depends on the question whether he was a resident of Johnson county at the time he offered to vote. As to this we have to say:

The qualification of voters is defined in the constitution, article 2, section 1, as follows: "Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote * * * ." Code, 772.

If it was the intention of the plaintiff to return to Mitchell county when he had finished his education, it would probably be conceded that his place of residence, within the meaning of the constitution, continued to be in Mitchell county during all the time he was absent. And, on the other hand, it would probably be admitted, if, when he went to Iowa City, or at any time thereafter before he offered to vote, his intention was to make that place his home and residence when he ceased to attend the University, that such place was and became his place of residence in such sense that he would have become a legal voter in Johnson county.

The case is somewhat different from these, for the plaintiff had not formed any intention of either staying or leaving Iowa City when he ceased to attend the University. But in legal contemplation, we think, there is no difference between the case before us and the first proposition above stated.

It is undoubtedly true that the residence of the plaintiff was in Mitchell county at the time he first went to Iowa City, and it must be equally true that it so continued until he acquired another. Another proposition will, we think, be conceded, and that is, that an individual cannot be entitled to vote in two different counties in this State at the same election. Yet he may, in a certain sense, actually reside in one and be a legal voter in another. He is entitled to vote only in the county where his home is—where his fixed place of residence is for the time being—and such place is, and must be, his domicile, or place of abode, as distinguished from a residence acquired as a sojourner for business purposes, the attainment of an education, or any other purpose of a temporary character. If a person leaves the place of his residence or home with intent of residing in some other place and making it his fixed place of residence, but never consummates such intent, it cannot be said his residence has been changed thereby. But if he so intends, and does actually become a resident of another place, then the former residence will be regarded as abandoned and a new one acquired. The intent and the fact must concur. *Hinds v. Hinds,* 1 Iowa, 36; *The State v. Minnick,* 15 Iowa, 123; the opinion of the judges in 5 Met., 587; *Fry's Election Case,* 71 Penn. St., 302.

The instructions given the jury are not in accord with the views above expressed, and must, therefore, be regarded as erroneous. The Circuit Court seems to have been of the opinion that if the plaintiff resided in Iowa City for the required length of time, and had no present intention of leaving when he ceased to attend the University, that such place, in a constitutional sense, became his residence. Under this view, the plaintiff would become a resident and voter in Iowa City although he was there for a temporary purpose and had not formed affirmatively the intention to become a resident of such place. This we do not think is the law, and, for the error in the instructions, the cause must be reversed. We deem it proper to say that the seventh instruction asked embodies correct propositions and should have been given without modification.

REVERSED.

DOMICIL FOR PURPOSES OF TAXATION.

PULLMAN CAR CO., V. PENN., 141 U. S. 18, (1891).

THIS was an action brought by the State of Pennsylvania against Pullman's Palace Car Company, a corporation of Illinois, in the Court of Common Pleas of the county of Dauphin in the State of Pennsylvania, to recover the amount of a tax settled by the auditor general and approved by the treasurer of that State, for the years 1870 to 1880 inclusive, on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other States over which its cars were run.

All these taxes were levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations, incorporated by the laws of Pennsylvania or of any other State, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes for 1870-1874 were levied under the statute of May 1, 1868, c. 69, sec. 5, which applied to corporations of every kind, with certain exceptions not material to this case, and fixed the amount of the tax at half a mill on every one per cent of dividend. Penn. Laws, 1868, p. 109. The taxes for 1875-1877 were levied under the statute of April 24, 1874, c. 31, sec. 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every one per cent of dividend. Penn. Laws, 1874, p. 70. The taxes for 1878-1880 were levied under the statutes of March 20, 1877, c. 5, sec. 3, and of June 7, 1879, c. 122, sec. 4, applicable to all corporations, except building associations, banks, savings institutions and foreign insurance companies, and fixing the tax at half a mill on each one per cent of dividend of six per cent or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. Penn. Laws, 1877, p. 8; 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the court, which found the following facts: "The defendant is a corporation of the State of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax is charged, to furnish sleeping coaches and parlor and dining-room cars to the various railroad companies with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who traveled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about one hundred coaches and cars engaged in this way in the State during that time. The cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State."

Upon these facts the court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used;" and therefore gave judgment for the State.

That judgment was affirmed, upon writ of error, by the Supreme Court of the State, for reasons stated in its opinion as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth, as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other States cannot wholly exempt them from taxation here. It reduces the value of the property in this State, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Penn. St. 156, 160.

Pullman's Palace Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of, or through the State of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Mr. Edward S. Isham and *Mr. William Barry* argued for the plaintiff in error at the argument on the 18th of October, 1888.

Mr. Edward S. Isham and *Mr. John S. Runnels* argued for the plaintiff in error at the argument on the 6th of March, 1890.

Mr. W. S. Kirkpatrick, Attorney General of the State of Pennsylvania, argued for the defendant in error at both arguments. *Mr. John F. Sanderson,* Deputy Attorney General of that State, was with him on the brief in both cases.

MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the court.

Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used. *Green* v. *Van Buskirk,* 5 Wall. 307, and 7 Wall. 139; *Hervey* v. *Rhode Island Lomocotive Works,* 93 U. S. 664; *Harkness* v. *Russell,* 118 U. S. 663, 679; *Walworth* v. *Harris,* 129 U. S. 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297-311. As observed by Mr.

Justice Story, in his commentaries just cited, "although movables are for many purposes to be deemed to have no situs, except that of the domicil of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner: and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. *Lane County v. Oregon,* 7 Wall. 71, 77; *Railroad Co.* v. *Pennsylvania,* 15 Wall. 300, 323, 324, 328; *Railroad Co.* v. *Peniston,* 18 Wall. 5, 29; *Tappan* v. *Merchants' Bank,* 19 Wall., 490, 499; *State Railroad Tax Cases,* 92 U. S. 575, 607, 608; *Brown* v. *Houston,* 114 U. S. 622; *Coe* v. *Errol,* 116 U. S. 517, 524; *Marys* v. *Baltimore & Ohio Railroad,* 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. *Delaware Railroad Tax,* 18 Wall. 206, 232; *Telegraph Co.* v. *Texas,* 105 U. S. 460, 464; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 206, 211; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts,* 125 U. S. 530, 549; *Marye* v. *Baltimore & Ohio Railroad,* 127 U. S. 117, 124; *Leloup* v. *Mobile,* 127 U. S. 640, 649.

Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicil of their owners. *Hays* v. *Pacific Mail Steamship Co.,* 17 How. 596; *St. Louis* v. *Ferry Co.,* 11 Wall. 423; *Morgan* v. *Parham,* 16 Wall. 471; *Wiggins Ferry Co.* v. *East St. Louis,* 107 U. S. 365; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196.

Between ships and vessels, having their situs fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of any kind, having no situs so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." *Railroad Co.* v. *Maryland,* 21 Wall. 456, 470.

In *Gloucester Ferry Co.* v. *Pennsylvania,* on which the plaintiff in error much relies, the New Jersey corporation taxed by the State of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware River; and the difference in the facts of that case and of this, and in the rules applicable, was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the State." 114 U. S. 206. "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce." 114 U. S. 211.

Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. *Moran* v. *New Orleans,* 112 U. S. 69, 74; *Pickard* v. *Pullman's Southern Car Co.,* 117 U. S. 34, 43; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 497; *Leloup* v. *Mobile,* 127 U. S. 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. *Fargo* v. *Michigan,* 121 U. S. 230; *Philadelphia* & *Southern Steamship Co.* v. *Pennsylvania,* 122 U. S. 326.

The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 209; *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530, 552. This is not only admitted, but insisted upon, by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the Constitution and laws of the United States.

In the *State Railroad Tax Cases,* 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the State board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller delivering judgment said:

"Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local situs at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its situs, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. *Green* v. *Van Buskirk,* 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608.

"It is further objected that the railroad track, capital stock and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. *Delaware Railroad Tax,* 18 Wall. 206; *Erie Railroad v. Pennsylvania,* 21 Wall. 492." 92 U. S. 608, 611.

So in *Western Union Telegraph Co.* v. *Attorney General of Massachusetts,* 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the State, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

Even more in point is the case of *Marye* v. *Baltimore & Ohio Railroad,* 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124.

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its situs at the owner's domicil, and in adopting the system of tax ing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

MR. JUSTICE BRADLEY, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE HARLAN, dissenting.

EVIDENCE OF DOMICIL.

FIRTH v. FIRTH, 50 N. J. EQ. 137, (1892).

On *ex parte* hearing on petition, master's report and proofs taken before a master.

Mr. Silas W. De Witt, for petitioner.

VAN VLEET, V. C.

This is a suit for divorce by a husband against his wife for adultery. The crime charged has been proved. If the only question presented was whether or not the defendant's guilt had been established, the case could very easily be decided. But it presents another and much more troublesome query, namely: Had the petitioner, when he brought his suit, a right to sue for a divorce in this state? or, stated in another form, Has this court power, on the facts of the case as they appear in the proofs, to dissolve his marriage with the defendant? The decisive question of the case is one of jurisdiction.

The parties were married in Iowa. Though they lived together as husband and wife for nearly three years—from June 13th, 1886 (the date of their marriage), until May, 1889—they were never, during that period, in this state, either together or separately. The adulterous acts proved were committed in Chicago, Illinois. The defendant has been proceeded against as an absent defendant, resident in Illinois, and has been brought into court by notice published and served through the mail as required by the usual order of publication. Under this state of facts it is manifest that the only ground of jurisdiction on which a decree in favor of the petitioner can rest is, that he was a resident of this state, having his domicil here when he brought this suit. It is only on the ground that he is a citizen of this state, and as such entitled to the rights and remedies which its laws confer, that this court may, in the rightful exercise of its powers, ascertain, fix and declare his matrimonial *status*. The rule of jurisdiction in such cases was defined by Chancellor Zabriskie, in *Coddington* v. *Coddington, 5 C. E. Gr. 263, 264*, as follows: "Proceedings with regard to the validity or dissolution of marriage are, as was held in the celebrated case of the Duchess of Kingston, proceedings *in rem*. They actually operate upon the matter; they affirm, constitute or dissolve the marriage relation. By the well-settled principles of the *jus gentium*, or rules acknowledged by the codes of all civilized nations, and given effect by comity of law when not controlled by positive enactments, the position and relative *status* of every person is regulated by the law of his domicil." The domicil of origin is retained until another is acquired. After a person has abandoned his domicil of origin, his domicil will be considered to be in that place in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home. *Harral v. Harral, 12 Stew. Eq. 279, 285.*

The controlling question of the case then is, Was the petitioner a citizen of this state, having his domicil here, when he brought this suit? His petition was sworn to at Salt Lake City, Utah, on the 22d day of October, 1891, and filed on the 31st day of the same month. The first evidence he gave in the case as a witness was given at the same place on the 19th day of March, 1892, under a commission issued by this court. The reason he assigned in his affidavit to obtain the commission, why he could not give his evidence in this state, was that he was then located in Salt Lake City in connection with the Denver and Rio Grande railroad, and it was, consequently, impossible for him to leave the west and come east, and he was unable to say when he could get away from his work, which at that time confined him there. In giving his evidence under the commission, in reply to an interrogatory put to him in these words, "Where is your place of residence, and how long have you resided there?" he said, "Phillipsburg, New Jersey; I have resided there since 1863." When the case was first presented for consideration, the above question and answer embraced all the evidence there was going to show where the petitioner was domiciled when he brought this suit. As it was manifestly insufficient to prove the only fact which authorized the court to take jurisdiction of the suit, being, when viewed in its legal aspect, simply the statement of a conclusion, unaccompanied by the specification of a single fact tending to show that it was well founded, the petitioner was given leave to take further evidence. Since then he has returned to this state, and has been further examined on the matter under consideration. He gave his evidence before the special master to whom the cause had been referred to take proofs and make a report.

From the proofs now in the case, it appears that the petitioner was born at Phillipsburg, in this state, about 1863, and continued to live there until 1884, when he left and went to Nebraska, and afterwards to the Bermuda Islands, and remained absent until the *early part of 1885*. He then returned and remained here for *a short time,* but left again in the *spring of 1885* and went to Nebraska. His father died of phthisis or consumption over twenty years ago. This disease is supposed to be hereditary in the family. Up to the time the petitioner left in 1884 he had been a member of his mother's family, living with her in the homestead house, where she and her husband had lived up to the time of his death, and where she continued to live with her children after her husband's death. The petitioner, it will be observed, had attained his majority shortly before he left in the spring of 1885. He went away then, he says, on account of his health—in search of a climate less dangerous to a person predisposed to pulmonary diseases than that of this state. From the spring of 1885 he was continuously absent from this state and in the west, at Omaha, Denver, and Salt Lake City, until December, 1890. For the major part of this period, I judge from his evidence, he was employed as a clerk in the auditor's department of the Denver and Rio Grande Railroad Company. He says he was so employed for a year in Denver; then, in April, 1890, the office was transferred to Salt Lake City and he went with it, and continued to be employed in it up to December, 1890. He then came east to Phillipsburg and remained in the east until March, 1891, when he returned to Salt Lake City and resumed work in the same office, and was still at work there when he swore to his petition on the 22d day of October, 1891, and also when he gave his evidence under the commission on the 19th day of March, 1892.

So that it appears, from the petitioner's own testimony, that the facts as to his actual habitancy for the six years and six months intervening between the time when he left this state, in the spring of 1885, and the time when he filed his petition on the 31st day of October, 1891, are, that for three months of the six years and six months he was an inhabitant of this state, and that for the other six years and three months his place of actual habitation was without this state, and in the States of Nebraska and Colorado and Territory of Utah. He says, however, that he always considered and spoke of Phillipsburg as his home; wrote it as his place of residence on hotel registers; when he married in June, 1886, he gave that as his residence, and that he never paid poll tax in the west, nor voted anywhere except at Phillipsburg. But he does not tell when he voted at Phillipsburg. He certainly did not after the spring of 1885. He also says that there was a room in his mother's house which was called his, where he kept pictures, books, shells and other like things up to the time of his mother's death in January, 1892, when these things were removed to his brother's house in Phillipsburg, where they have since remained. As already stated, he and the defendant were married on the 13th day of June, 1886, at Red Oak, Iowa, and lived together thereafter, as husband and wife, continuously until May, 1889. The petitioner says he and his wife never kept house, and stops there. He does not tell where they made their abiding place or home—where they ate, slept and surrounded themselves with such things as their relation, comfort and position required them to have. In May, 1889, the defendant left the petitioner to visit her uncle in Chicago. The petitioner procured passes for her journey. After she reached Chicago she refused to return. The petitioner says she first wrote that she would have nothing more to do with him, and that afterwards he called on her in Chicago and urged her to return and she refused. The foregoing statement embraces, I believe, every fact entitled to the least consideration in determining the question now under consideration.

The decision of questions of disputed domicil are frequently surrounded with a great many practical difficulties. The evidence is often obscure, equivocal and contradictory. The acts or conduct of the person whose domicil is the subject of dispute will, in many cases, seem to indicate with certainty that his residence must have been in one place, while his declarations go to show that it was in another. That is the case here. If we look at the petitioner's acts alone, and remember that he left just after he had attained the age when he was at liberty to go where he pleased, engage in any pursuit he saw fit, and establish a new home for himself; that he went in search of a more genial climate, in order to protect himself against a disease which it was believed he had inherited, and which it was feared would surely claim him as its victim if he remained here; that he found such a climate together with steady and pleasant employment; that within a little over a year after he went away he married, and thus placed himself in a position where a home, in which he might set up his household gods, became, unless he is strangely different from other men, the natural desire of his heart; that although he lived with his wife for nearly three years, she and he were never, during that time, at his home of origin in this state; that he remained continuously absent from this state for over five years and six months, and that shortly after he came here in December, 1890, he returned to Salt Lake City, and at once, on his return, resumed the work he was doing when he left, and that he was still there, engaged in the same work, on the 31st day of October, 1891, when he swore to his petition in this case, the conclusion would seem to be well nigh unavoidable that he had abandoned his domicil of origin and established a new home. He swears, on the contrary, that he did not, but that his intention has always been to retain his domicil of origin. The actual intention of the person whose domicil is in dispute is, in cases of this kind, a fact of great importance, but the best and most trustworthy evidence of it is found, as a general rule, in his acts rather than in his declarations. His declarations may be competent as evidence of his intentions, but they are by no means conclusive, and when they are contradicted by decisive acts of habitancy, as holding office, voting and the like, their probative force is very light. In two cases, decided by the supreme court of Massachusetts in 1879, it appeared that the two persons whose domicils were in dispute had, as they testified, made up their minds to change their permanent residences from Boston to Nahant, and that they subsequently gave notice, in writing to the taxing authorities of Boston that they had done so, but it likewise appeared that, after the alleged change, though they spent a part of their time at Nahant, they continued, for a part of each year, to occupy dwellings in Boston which were more in keeping with their means and position than those they lived in while at Nahant, and that acts of habitancy had been performed at both places. The jury found they were domiciled in Boston, and the court, after hearing the case on exceptions, ordered judgments to be entered on the verdicts, declaring that the evidence of the parties as to their intention was not conclusive, but their acts must also be considered. *Wright* v. *Boston, 126 Mass. 161; Weld* v. *Boston, 126 Mass. 166.*

My consideration of this case has led me to the conclusion that the decided weight of the evidence tends rather to show that the petitioner was not a resident or citizen of this state when he brought his suit than that he was; or, at least, that the evidence leaves his claim in that regard in a state of so much doubt and uncertainty that the court should not in a case like this, where the fact of citizenship constitutes the sole ground of jurisdiction, make a decree attempting to fix and declare his matrimonial *status*

The petition must be dismissed.

NATIONALITY.

CITIZENSHIP AND RIGHT OF EXPATRIATION.

PEQUIGNOT v. CITY OF DETROIT, 16 FED. REP. 211, (1883).

On motion for a New Trial.

The plaintiff brought suit against the city of Detroit to recover damages for personal injuries sustained by her, by reason of a defective walk across an alley which intersects Twenty-third street, between Fort and Lafayette. The plaintiff recovered a verdict, and defendant moved for a new trial upon the grounds stated in the opinion of the court.

John D. Conely, for plaintiff.

Henry M. Duffield, City Counselor, for defendant.

Brown, J. The first error assigned by the defendant is based upon the ruling of the court, that the walk, upon which the plaintiff met her fall, was a crosswalk and not a sidewalk, within the meaning of the state act of 1879, No. 244. This act, which is entitled "An act for the collection of damages sustained by reason of defective public highways, streets, bridges, crosswalks, and culverts," creates a liability in favor of persons "sustaining bodily injury upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, crosswalks, and culverts in good repair."

We acquiesce in the opinion of the supreme court in *City of Detroit* v. *Putnam,* 45 Mich. 263, [S.C. 7 N.W. Rep. 815,] that this act does not include sidewalks. But we cannot perceive that this case has any bearing upon the question under consideration. We think the statute of 1879 was intended to distinguish between those portions of the streets which the city itself constructs and keeps in repair, and that other portion, viz., sidewalks, which it compels property-owners to build and keep in repair, rendering the city liable in one case and not in the other. Defendant's theory is that the alley begins at the outside of the sidewalk. But it seems quite clear that an alley, to be serviceable for the passage of teams, must begin at the curbstone, between the sidewalk and the street. Suppose, for instance, that the property-owners upon the opposite sides of an alley should extend fences across the intervening space. It is too plain for argument that they would be liable for obstructing the alley. Every crosswalk is, in one sense, a sidewalk, because it is an extension of the sidewalk proper across an intervening space; but it seems to us to make no difference whether it crosses a street or an alley. In each case it crosses a highway for the passage of teams, and is a part of the street which the city itself builds and keeps in repair.

The main question in this case, however, relates to the alienage of the plaintiff, upon which new affidavits were offered upon this motion. The court charged upon the trial that as the plaintiff was a native of France, it did not sufficiently appear that she had ever become a citizen of the United States. The new affidavits show unequivocally that she at one time did become a citizen by marriage, but the question still remains to be determined whether at the time she brought this suit she was an alien or a citizen. Plaintiff was born in France, of French parents, who emigrated to this country when she was six or seven years old, but were never naturalized. In 1863 she was married to James Partridge, who was a native-born American citizen, and thereby under the act of February 10, 1855, (reproduced in the Revised Statutes, sec. 1994,) became a citizen of the United States. She lived with Partridge some 13 or 14 years, and was then divorced from him. Shortly thereafter she was married to Augustine Pequignot, who was himself born in France in 1835, and has never become an American citizen, or even declared his intention to do so. The plaintiff is still living in this state with him as his wife.

The case raises a novel and interesting question: whether an alien woman, who has once become an American citizen by operation of law, can resume her alienage by marriage to an alien husband. If we are bound by the case of *Shanks* v. *Dupont*, 3 Pet. 242, *in its literalisms, then the plaintiff did not lose her citizenship* by marrying a native of her country, an alien. In that case, it was held that a native of Charleston, who married a British officer in 1781, during a temporary and hostile occupation of the city by the British, and subsequently went to England with him and remained there until her death, did not by such marriage cease to be a citizen of South Carolina, but that her withdrawal to England, and her permanent allegiance to the side of the enemies of the state down to the time of the treaty of peace in 1783, operated as a virtual dissolution of her allegiance. On page 246, the court briefly observes that the marriage with the British officer did not produce that effect, because the marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife; giving as its reasons for this ruling: (1) That no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens; (2) if it were otherwise, then a *feme* alien would by marriage become, *ipso facto,* a citizen, and would be dowable of the estate of her husband, which are clearly contrary to law.

Now, the general doctrine above stated, that no person can put off his allegiance without the consent of the government, is no longer the law in this country, since it is expressly declared by Rev. St. sec. 1999—

"That the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the government thereof; and whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental rules of the republic."

The second reason, too, is no longer law, since by the act of February 10, 1855, (Rev. St. sec. 1994,) "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be naturalized, shall be deemed a citizen." It seems to me, therefore, that we ought to apply the maxim *"cessante ratione, cessat lex"* to this case, and are not bound to treat it as controlling authority. It seems to me, too, that we should regard the sections above quoted as announcing the views of congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband, that we should to a case where an alien woman marries an American citizen.

It is satisfactory, though perhaps not important, to know that the French law upon this subject is the same as ours. In the Civil Code of France, book 1, tit. 1, sec. 12, it is declared that "a foreign woman who shall have married a Frenchman shall follow the condition of her husband;" and in England it is enacted by the sixteenth section of 7 & 8 Vict. c. 66, (1844,) "that any woman married, or who shall be married, to a natural-born subject or a person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." While I am unable to see how the law of France can fix the *status* of the plaintiff in this country, concurring in this respect with the opinion of Atty. Gen. Hoar, (13 Op. Atty. Gen. 91,) I see no reason why we should not apply the same law to wives of alien husbands in this country that we do to American women marrying abroad. The fact that the French law corresponds with our own upon this subject, however, is an additional argument for the same application of the statute to citizens of both powers.

The only complication in this case is that the marriage took place and the parties reside in this country; but, while residence undoubtedly creates a presumption of citizenship, (*State* v. *Beackmo,* 6 Blackf. 488,) it is merely *prima facie* evidence, and may easily be rebutted. Suppose, for example, that an American citizen residing in France should marry a French woman, would she not thereby become an American citizen, and remain so though they continued to reside in France? There is no exception in the statute of marrying foreign women *and residing abroad,* and I know of no authority for interpolating one. It is true that section 1994 limits the right of any woman, marrying a citizen of the United States, to be deemed a citizen, to one "who might herself be lawfully naturalized," and it was at one time an open question whether the woman must not herself have resided within the United States for five years before she could be deemed an American citizen.

In *Burton* v. *Burton,* 1 Keyes, 359, the judges of the court of appeals of the court of New York seemed to be divided in opinion upon this point. Mr. Justice MULLEN (p. 362) says that "if a residence for five years was not a condition precedent to citizenship, residence for some length of time was most obviously contemplated." "Without residence she could not be naturalized, and it is the most essential of all the requirements for naturalization, and cannot be dispensed with, unless the intention to dispense with it is most clearly manifested by the legislature." Upon the other hand, Mr. Justice WRIGHT (p. 374) thought that the act did not require that the woman claiming its benefits should have resided within the United States; and, if it did, he thought the residence of the plaintiff was, by construction of law, the same as that of her husband. All doubt upon the construction to be placed upon the words, "who might herself be naturalized," was put at rest by the case of *Kelly v. Owen,* 7 Wall. 496, in which it was held that these terms only limited the application of the law to "free white women," inasmuch as the naturalization act existing at the time only required that a person applying for its benefits should be a "free white person," and not an alien enemy. Since this case was decided the provision has been still further restricted by section 2169, which admits aliens of African nativity and persons of African descent to naturalization. This opinion, however, does not cover the case of residence abroad.

In an opinion of Atty. Gen. Williams, (14 Op. Atty. Gen. 402,) he held directly that an alien woman who has intermarried with a citizen of the United States residing abroad, the marriage having been solemnized abroad, and the parties after marriage continuing to reside abroad, is to be regarded as a citizen of the United States within the meaning of said act, though she may not have resided within the United States. So, also, in opinion delivered in 1869, Atty. Gen. Hoar decided that a woman born in the

United States, but married to a citizen of France and domiciled there, was not "a citizen of the United States residing abroad," within the meaning of the internal-revenue law. It seems from the opinion that prior to this Atty. Gen. Stanbery had made a simi-law decision. Upon the contrary, Atty. Gen. Bates decided in 1862, (10 Opp. Atty. Gen. 321,) that a woman born in this country, who married a Spanish subject residing here and then removed to Spain with her husband and child, and subsequently died there, was still an American citizen at her death. He held that the removal of the lady and her daughter to Spain, and their residence there, were no evidence of an attempt to expatriate themselves. I think it would be difficult to give any sound reason for this conclusion. Another case, almost precisely like the one under consideration, was decided by Atty. Gen. Taft (15 Op. Atty Gen. 599) in favor of plaintiff's citizenship, upon the single authority of *Shanks* v. *Dupont,* 3 Pet. 342. These two cases are irreconcilable with the others, and are unsatisfactory to my mind. In *Kane* v. *McCarthy,* 63 N. C. 299, it was held that a woman who in 1857 had married in Ireland a naturalized citizen of the United States, could inherit property, although she had always resided in Ireland, and continued to do so until after descent çast.

It will be noticed that legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative, at least for the purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power. The act of April, 1802, Rev. St. 2172, has declared that the minor children of naturalized persons should be considered as citizens of the United States. Then in 1804 (section 2168) it was enacted that if any alien has declared his intention of becoming a citizen, and dies before he is actually naturalized, his widow and children shall be considered as citizens, upon taking the oath prescribed by law; and finally, by the act of 1855, Rev. St. sec. 1994, that an alien woman married to a citizen shall herself be deemed a citizen.

Now, if we concede that a French woman marrying an American citizen abroad thereby becomes an American citizen, I see no reason why the same law should not be administered here; and whenever an American citizen, especially if she be originally a native citizen of France, marries a French citizen here, she should not be deemed and taken to be a citizen of the French republic. If she be an American citizen, it must be upon the theory, either that the *residence* of the wife is essential to citizenship, or that we should apply a different interpretation when an alien woman claims citizenship by operation of law from that applied where a native-born one claims expatriation by operation of the same law. Putting the converse of the case under consideration, suppose a native American woman were to go to Paris and marry a Frenchman. By the statutes of both countries she would thereby become a French citizen. But subsequently her husband dies, and she is married again to a native-born citizen of the United States residing in Paris. I think there would be little hesitation in holding that she was reinstated in her allegiance to her native land.

It is true that the law of France upon this subject has not been proved before us as a *fact,* but a copy of the Code Napoleon, purporting to issue from the publishing house of the council of state, at Paris, and bearing all the marks of authenticity, was produced and commented upon by counsel, without objection upon the hearing of this motion, and I think it is too late now to object to this evidence, although upon a trial before a jury it could not be received. The granting of new trials being largely matter of discretion, I would not decline to receive as the law of a foreign country that which could be proved as such by the mere authentication of a book.

Upon the whole case, then, I have come to the conclusion that plaintiff, being a native of France, and becoming a citizen of the United States by her first marriage, resumed her allegiance to her native country by marrying a French citizen, and is therefore an alien, entitled to bring this suit. The motion for a new trial must be denied.

ALIEN ENEMIES.

CLARK v. MOREY, 10 JOHNS (N. Y.) 69, (1813).

THIS was an action of *assumpsit,* on a promissory note made by the defendant to the plaintiff, dated the 5th *June,* 1811, for 209 dollars and 50 cents, payable on demand. The declaration was filed in *May* term, 1812. In *August* term last the defendant pleaded, 1. *Non assumpsit;* 2. That the plaintiff ought not to have and maintain his action, &c., because, the defendant says, that the plaintiff is an *alien,* born in foreign parts, out of the allegiance of the *United States of America,* and within the allegiance of a foreign state, to wit, of the united kingdom of *Great Britain* and *Ireland,* and not made a citizen of the *United States of America,* by naturalization, or otherwise, to wit, at, &c. And that the persons exercising the powers of government in the said foreign state, the united kingdom of *Great Britain* and *Ireland* aforesaid, are at war with, and enemies of, the *United States of America,* to wit, at, &c., and that the said plaintiff, so being such alien born, &c. and an enemy of the *United States of America,* and not made a citizen by naturalization, or otherwise, entered and came into the *United States of America,* and still remains therein, without any letters of safe conduct from the President of the *United States of America,* or any license to be, reside or remain in these *United States of America:* And this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought further to have or maintain his aforesaid action thereof against him," &c.

To this plea there was a demurrer, and joinder in demurrer.

The cause was submitted to the court without argument.

KENT, Ch. J. delivered the opinion of the court. The second plea states that the plaintiff is an alien, born out of the allegiance of the *United States,* and under the allegiance of the king of the united kingdom of *Great Britain* and *Ireland,* and not naturalized, and that war exists between the *United States* and the said kingdom; and that the plaintiff came into the *United States* and remains here without any letters of safe conduct from the President of the *United States,* or any license to remain here.

This plea is not without precedent in the *English* books; (*Rast. Ent.* 252. b. 605. b. *Denier* v. *Arnaud,* 4 *Mod.* 405. the record of which plea Lord *Kenyon,* in 8 *Term Rep.* 167, says he had examined;) but there are many and weighty reasons why it cannot be supported. To render the plea of alien enemy good, it seems now to be understood to be the law of *England* that the plea must not only aver that the plaintiff was an alien enemy, but that he was adhering to the enemy. The disability is confined to these two cases; 1. Where the right sued for was acquired in actual hostility, as was the case of the ransom bill in *Anthon* v. *Fisher;* (*Doug.* 649. note.) 2. Where the plaintiff, being an alien enemy, was resident in the enemy's country; such was the form of the plea in *George* v. *Powell,* (*Fortesc.* 221.) and in *Le Bret* v. *Papillon;* (4 *East,* 502.) and such was the case with the persons in whose behalf, and for whose benefit, the suit was brought upon the policy, in *Brandon* v. *Nesbitt.* (6 *Term Rep.* 23.)

It was considered in the common pleas, at *Westminster,* as a settled point, (*Heath,* J. and *Rooke,* J. in *Sparenburgh* v. *Bannatyne,* 1 *Bos. & Pull.* 163.) that an alien enemy under the king's protection, even if he were a prisoner of war, might sue and be sued. This point had long before received a very solemn decision in the case of *Wells* v. *Williams.* (1 *Ld. Raym.* 282. 1 *Lutw.* 34. S. C. 1 *Salk.* 46.) It was there decided that if the plaintiff came to *England* before the war, and continued to reside there, by the license and under the protection of the king, he might maintain an action upon his personal contract; and that if even he came to *England* after the breaking out of the war, and continued there under the same protection, he might sue upon his bond or contract; and that the distinction was between such an alien enemy, and one *commorant* in his own country. The plea, in that case, averred that the plaintiff was not only born in *France,* under the allegiance of the *French* king, then being an enemy, but that he came to *England,* without any safe conduct, and the plea was held bad on demurrer. It was considered, that if the plaintiff came to *England* in time of peace, and remained there quietly, it amounted to a license, and that if he came over in time of war, and continued without disturbance, a license would be intended. It is, therefore, not sufficient to state that the plaintiff came here without safe conduct. The plea must set forth, affirmatively, every fact requisite to prove that the plaintiff has no right of action. It is not to be favoured by intendment. This was the amount of the decision in *Casseres* v. *Bell;* (8 *Term Rep.* 166,) and one of the judges, in that case, referred to the decision in *Wells* v. *Williams,* as authority, and so it has uniformly been considered in all the books; and all the former precedents and *dicta* that are repugnant to it may be considered as overruled. Though there is a loose and unsatisfactory note of *Sylvester's Case,* in 7 *Mod.* 150, which was a few years later, and looks somewhat to the contrary; yet it never has been considered as affecting the former decision Indeed, the law on this subject has undergone a progressive improvement. The doctrine once held in the *English* courts, that an alien's bond became forfeited by the war, (*Year Book,* 19 *Edw.* IV. pl. 6.) would not now be endured. The plea is called in the books an odious plea, and the latter cases concur in the opinion that the ancient severities of war have been greatly and justly softened, by modern usages, the result of commerce and civilization.

In the case before us, we are to take it for granted (for the suit was commenced before the present war) that the plaintiff came to reside here before the war, and no letters of safe conduct were, therefore, requisite, nor any license from the president. The license is implied by law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the executive shall think proper to order the plaintiff out of the *United States;* but no such order is stated or averred. This is the evident construction of the act of congress of the 6th *July,* 1798, entitled "An act respecting alien enemies." (Sess. 1. cong. 5. c. 73.) Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us. A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.

The right to sue, in such a case, rests on still broader ground than that of a mere municipal provision, for it has been frequently held that the law of nations is part of the common law. By the law of nations, an alien who comes to reside in a foreign country, is entitled, so long as he conducts himself peaceably, to continue to reside there, under the public protection; and it requires the express will of the sovereign power to order him away. The rigour of the old rules of war no longer exists, as *Bynkershoek* admits, when wars are carried on with the moderation that the influence of commerce inspires. It may be said of commerce, as *Ovid* said of the liberal arts: *Emollit mores, nec sinit esse feros.*

We all recollect the enlightened and humane provision of *Magna Charta* (c. 30.) on this subject; and in *France* the ordinance of *Charles* V. as early as 1370, was dictated with the same magnanimity; for it declared that in case of war, foreign merchants had nothing to fear, for they might depart freely with their effects, and if they happened to die in *France,* their goods should descend to their heirs. (*Henault's Abrege Chron.* tom. 1. 338.) So all the judges of *England* resolved, as early as the time of *Henry* VIII. that if an alien came to *England,* before the declaration of war, neither his person, nor his effects, should be seized in consequence of it. (*Bro.* tit. *Property,* pl. 38. *Jenk. Cent.* 201. *Case* 22.) And it has now become the sense and practice of nations, and may be regarded as the *public law of Europe,* (the anomalous and awful case of the present violent power on the continent excepted,) that the subjects of the enemy, (without confining the rule to merchants,) so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued. (*Bynk. Quaest. Jur. Pub.* b. 1. c. 7. c. 25. s. 8.) It is even held, that if they are ordered away, in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit. (*Emerigan, Traite des Assurances,* tom. 1. 567.)

Modern treaties have usually made provision for the case of aliens found in the country, at the declaration of war, and have allowed them a reasonable time to collect their effects and remove. *Bynkershoek* gives instances of such treaties, existing above two centuries ago; and for a century past, such a provision has become an established *formula* in the commercial treaties. *Emerigon,* who has examined this subject with the most liberal and enlightened views, considers these treaties as an affirmance of common right, or the public law of *Europe,* and the general rule is so laid down by the later publicists, in conformity with this provision. (*Vattel,* b. 3. c. 4. s. 63. *Le Droit Public de L'Europe, par Mably. Oeuvres,* tom. 6. 334.) Some of these treaties have provided that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they behave peaceably; (*Treaty of Commerce between Great Britain and France, in* 1786, *and of Amity and Commerce between Great Britain and the United States, in* 1794;) and where there was no such treaty, the permission has been frequently announced in the very declaration of war. Sir *Michael Foster* (*Discourse of High Treason,* 185, 186.) mentions several instances of such declarations; and he says that the aliens were thereby enabled to acquire personal chattels, and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends. The act of congress of *July,* 1798, before alluded to, provides, in cases where there may be no existing treaty, a reasonable time, to be ascertained and declared by the president, to alien enemies resident at the opening of the war, "for the *recovery,* disposal and removal of their goods and effects." This statute may be considered, in this respect, as a true exposition and declaration of the modern law of nations.

The opinion that wars ought not to interfere with the security and collection of debts has been constantly gaining ground, and the progress of this opinion is worthy of notice, as it will teach us with what equity and liberality, and with what enlarged views of national policy, the question has been treated. A right to confiscate the debts due to the enemy was the rigorous doctrine of the ancient law; but a temporary disability to sue, was all *Grotius* (b 3. c. 20. s. 16.) seemed willing to allow to hostilities. Since his time, continued and successful efforts have been made to strengthen justice, to restrain the intemperance of war, and to promote the intercourse and happiness of mankind. The power to collect debts, notwithsanding the event of war, is not an unusual provision in the conventional law of nations. In the treaty of commerce between *England* and *France,* in 1713, it was provided by the 2d article, that in case of war, the subjects of each power residing in the dominions of the other, should be allowed six months to retire with their property, and in the mean time, should be at full liberty to dispose of the same, "and the subjects on each side were to have and enjoy good and speedy justice, so that during the said space of six months they may be able to recover their goods and effects." So also in the treaty of commerce between *Great Britain* and *Russia,* in 1766, and again in 1797, it was provided, that in case of war, the subjects of each were to be allowed one year to withdraw with their property; and they were also authorized to substitute others to collect their debts for their benefit, "which debts the debtors should be obliged to pay in the same manner as if no such rupture had happened." A similar provision, in substance, was inserted in the treaty between the *United States* and *Russia,* in 1785; and in the treaty of commerce between the *United States* and *Great Britain,* in 1795, the government of each country was prohibited to interfere, either by confiscation or sequestration, with private contracts, and it was expressly declared to be unjust and impolitic, that the debts of individuals should be *impaired* by national differences.

The case before us does not raise the question, nor do we give any opinion in favour of the right of action by aliens who resided in the enemy's country when war was declared, and when the action was commenced. The cases appear to be against such right. But as to aliens who were residents with us when the war broke out, or who have since come to reside here, by a presumed permission, the authorities seem to be decisive. And whether we consider this case in reference to the decisions of the *English* courts, to the act of congress, or to the sense of *European* nations, declared in their treaties, and by their writers on public law, the plea must be overruled; and the plaintiff is entitled to judgment, upon his demurrer.

Judgment for the plaintiff.

THE VENUS, 8 CRANCH 253, (1814),

Appeal from the sentence of the Circuit Court for the district of Massachusetts. The following were the facts of the case, as stated by Washington, J., in delivering the opinion of the court.

This is the case of a vessel which sailed from Great Britain, with a cargo belonging to the respective claimants, as was contended, before the declaration of war by the United States against Great Britain was or could have been known by the shippers. She sailed from Liverpool, on the 4th of July, 1812, under a British license, for the port of New York, and was captured. on the 6th of August, 1812, by the American privateer Dolphin, and sent into the district of Massachusetts, where the vessel and cargo were libelled in the district court.

The ship, 100 casks of white lead, 150 crates of earthenware, 35 cases and 3 casks of copper, 9 pieces of cotton bagging, and a quantity of coal, were claimed by Lenox & Maitland. 198 Packages of merchandise and 25 pieces of cotton bagging were claimed by Jonathan Amory, as the joint property of James Lenox, William Maitland and Alexander McGregor; not distinguishing the proportions of each: but the 25 pieces of cotton bagging were afterwards claimed for McGregor as his sole property, and also 5 trunks of merchandise. 21 trunks of merchandise were claimed by James Magee, of New York, as the joint property of himself and John S. Jones, residing in Great Britain.

The district court, on the preparatory evidence, decreed restitution to Magee & Jones, and also to Lenox & Maitland, except as to the 100 casks of white lead; as to which, and as to the claim of McGregor, further proof was ordered. From this decree, so far as it ordered restitution of the merchandize to Magee & Jones, and to Maitland, and of the ship to Lenox & Maitland, the captors appealed to the circuit court, where the decree was affirmed *pro forma,* and an appeal was taken to this court.

In April, 1813, the cause was heard, on further proof, in the district court; and in August, the claim of McGregor was rejected, as well as that of Lenox & Maitland to the white lead. But at another day, on a further hearing, the court ordered restitution to McGregor of one-fourth of the property claimed by him, and condemned the other three-fourths as belonging to his partners, being British subjects. Both parties appealed, as did also Lenox & Maitland, in relation to the white lead. A *pro forma* decree of affirmance was made, from which an appeal was taken to this court.

Maitland, McGregor and Jones were native British subjects, who came to the United States, many years prior to the present war, and, after the regular period of residence, were admitted to the rights of naturalization. Some time after this, but long prior to the declaration of war, they returned to Great Britain, settled themselves there, and engaged in the trade of that country, where they were found carrying on their commercial business, at the time these shipments were made, and at the time of the capture. Maitland is yet in Great Britain, but has, since he heard of the capture, expressed his anxiety to return to the United States; but has been prevented from doing so, by various causes set forth in his affidavit. McGregor actually returned to the United States some time in May last; Jones is still in England.

Saturday, March 12th, 1814. (Absent, Livingston, J.) WASHINGTON, J., after stating the facts of the case, delivered the opinion of the majority of the court, as follows:—The claims of Maitland, McGregor and Jones are resisted, *in toto,* upon an objection to the national character of the claimants. The general question affecting these parties, will, for the present, be postponed, in order to dispose of particular objections which are made to all the claims, either in whole or in part, and which will depend on the particular circumstances applying to those cases.

1. The first claim that will be considered will be that of Lenox & Maitland to the 100 casks of white lead, which, it is contended, is the property of Thomas Holloway, an acknowledged British subject, but shipped in June, 1812, by William Maitland & Co. (a house established in Liverpool, and composed of William Maitland and James Lenox) ,to Lenox & Maitland, a house established at New York, and composed of the same parties. To establish the fact of property in Thomas Holloway, the captor relies-

upon the following evidence: The original bill of parcels, inclosed in a letter, under date of the 3d of July, 1812, from William Maitland & Co. to Lenox & Maitland, which is headed thus, "Thomas Holloway bought of Thomas Walker & Co., lead merchants," dated June 2d, 1812. In corroboration of this *prima facie* evidence of property in Holloway, the freight and primage of this lead is cast in the margin of the bill of lading, but not so upon the acknowledged property of Lenox & Maitland, the owners of the ship, and included in the same bill of lading; from which circumstances, it is argued, that this article did not belong to Lenox & Maitland: since, if it did, no freight could have been charged on it, any more than upon the other parts of the cargo claimed by them. In addition to this, in a list of goods shipped by William Maitland & Co. by this vessel, on account of and consigned to Lenox & Maitland, and inclosed in a letter of the 22d August, 1812, from the former to the latter, by the Lady Gallatin, all the goods claimed by that house separately, and also by them and McGregor jointly, are enumerated, except this parcel of white lead. This evidence is certainly very strong to fix a hostile character on this property, and it is rendered conclusive, by the omission of Maitland, in his affidavit made under the order for further proof, to say anything in relation to the white lead, although he is very particular as to all the other property claimed by Lenox & Maitland, and by that house jointly with McGregor. This court is, therefore, of opinion, that the court below did right in rejecting this claim.

2. The next claim to be considered is that of Magee & Jones to a part of the cargo on board this vessel. Magee is a citizen of the United States, settled in New York, and connected with Jones in a house of trade. It is urged by the captors, that the whole of this property ought to have been condemned as the sole property of Jones. The bill of lading of these goods expresses them to be shipped by McGregor & Co., unto and on account of James Magee & Co., of New York. The invoice is signed by Jones, at Manchester, in England, and describes them as goods to be shipped on board the Venus, and to be consigned to James Magee & Co., of New York; but it does not specify on whose account and risk. In a letter from Jones to Magee, dated the 1st of July, 1812, cov-

ering an invoice of these goods, he says, "they are to be sold on joint account, or on mine, at your option." The whole question, as to the exclusive property of Jones in these goods, is rested, by the captors, upon the above expressions giving an option to Magee to be jointly concerned or not in the shipment. The question of law is, in whom the right of property was at the time of capture? To effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale, agreed to by both parties; and if the thing agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which the master, to many purposes, is considered to be. The only evidence of a contract, such as is now set up, appears in the affidavit of Magee, who states, that in 1810, he was in England, and agreed with Jones, that the latter should ship goods on joint account, when the intercourse between the two countries should be opened; and that in consequence of this agreement, the present shipment was made. Now, admit that such an agreement was made, yet the delivery of the goods to the master of the vessel was not for the use of Magee & Jones, any more than it was for the use of the shipper solely; and consequently, it amounted to nothing so as to divest the property out of the shipper, until Magee should elect to take them on joint account, or to act as the agent of Jones. Until this election was made, the goods were at the risk of the shipper, which is conclusive as to the right of property.

3. The next claim is that of Lenox & Maitland to the ship. The facts in relation to this subject are, that James Lenox, as joint-owner, with William Maitland, of this ship, obtained, in November, 1811, a register for her, which was granted upon his oath, that he, together with William Maitland, of the city of New York, merchant, were the only owners. At this time, Maitland was domiciled in Great Britain; and it is contended that the statement that Maitland was of New York, was untrue, and subjected the vessel to forfeiture, under the act of congress of the 31st of December, 1792; and that although no claim is interposed for the United States, still the forfeiture produced by the misconduct of Lenox, is sufficient to turn him out of court, whatever disposition

may ultimately be made of the property. The rule of the prize court is correctly stated in this argument; and the only question is, whether a forfeiture did accrue to the United States. The act of congress directs, that the owner who takes the oath, in case there are more than one owner, shall, in his oath, specify the names and places of abode of such owners, and that they are citizens of the United States, if such be the fact; and if one or more of them reside abroad, as a partner or partners in a co-partnership consisting of citizens, and carrying on trade with the United States, that such is the case. The law then proceeds to declare, that if any of the matters of fact in the said oath alleged, within the knowledge of the party swearing, shall not be true, the ship shall be forfeited to the United States. It cannot be denied, that at the time this oath was taken, William Maitland was a resident merchant of Great Britain, carrying on trade with the United States; a fact totally inconsistent with that alleged in the oath, that he was of the city of New York. It is probable, and the court is willing to believe, that this statement was innocently made, under a misconception of the real character which the foreign domicil of Maitland had impressed upon him. But still, the law required explicitness on this point, and marked the distinction between a person residing abroad, and one residing within the United States. It must be admitted, in point of law, that the fact sworn to by Lenox was not true; and the consequence is, a forfeiture of the ship to the United States. The claim, therefore, of Lenox & Maitland to this vessel must be rejected. What order shall be made as to the ultimate disposition of the property, must depend upon the opinion which this court may give in some other cases touching this subject.

The great question involved in this, and many other of the prize cases which have been argued, is, whether the property of these claimants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruiser, ought to be condemned as lawful prize. It is contended by the captors, that as these claimants had gained a domicil in Great Britain, and continued to enjoy it, up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and consequently, that it may legally be seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it is then insisted, that these claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there re-settled themselves, they became reintegrated British subjects, and ought to be considered by this court in the same light as if they had never emigrated. On the other side, it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States; and that, until such election was, *bona fide*, made, the courts of this country are bound to consider them as American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

There being no dispute as to the facts upon which the domicil of these claimants is asserted, the questions of law alone remain to be considered. They are two: 1st. By what means and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? And 2d. What are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

1. The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicil*, which he defines to be, "a habitation fixed in any place, with an intention of always staying there." Such a person, says this author, becomes a member of the new society, at least, as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of

domicil, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration. Vatt. p. 92, 93. Grotius no where uses the word *domicil,* but he also distinguishes between those who stay in a foreign country, by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates strangers, and the latter, subjects; and it will presently be seen, by a reference to the same author, what different consequences these two characters draw after them.

The doctrine of the prize courts, as well as of the courts of common law, in England, which, it was hinted, if not asserted, in argument, had no authority of universal law to stand upon, is the same with what is stated by the above writers; except that it is less general, and confines the consequences resulting from this acquired character to the property of those persons engaged in the commerce of the country in which they reside. It is decided by those courts, that whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and is to be considered (even by his own or native country, in the former case), as having a hostile character impressed upon him.

In deciding whether a person has obtained the right of an acquired domicil, it is not to be expected, that much, if any, assistance should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is, that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered is the *animus manendi;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear, that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. *The Bernon,* 1 Rob 86, 102. As to some other rules of the prize courts of England, particularly those which fix a national character upon a person on the ground of constructive residence, or the peculiar nature of his trade, the court is not called upon to give an opinion at this time: because, in this case, it is admitted that the claimants had acquired a right of domicil in Great Britain, at the time of the breaking out of the war between that country and the United States.

2. The next question is, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral, in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in

the commerce of the enemy, applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state, domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide,* to quit the country *sine animo revertendi. The Indian Chief,* 3 Rob. 12, 17. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bona fide,* and without an intention of returning. If anything short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable, that the evidence of a *bona fide* intention to remove should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or, at least, rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies those declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded, which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put it in his power to claim which-ever may best suit his purpose, when it is called in question? If his property be taken, trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the country of the enemy to his own, then neutral, and therefore, that as a neutral, the trade was lawful? If war exist between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character; and thus to parry the belligerent rights of both? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted.

Upon what sound principle, can a distinction be framed, between the case of a neutral, and the subject of one belligernt domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in their character of subjects of that country, so long as they continued to retain their domicil; and when a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows, that the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common law and prize courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by Grotius, p. 563, "that all the subjects of the enemy who are such from a permanent cause, that is to say, settled in the country, are liable to the law of reprisals, whether they be natives or foreigners; but not so, if they are only trading or sojourning for a little time." And why, it may be confidently asked, should not the property of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it (with an exception in favor of such a subject, in relation to his native country), in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, in regard to other states. It belongs, in some sort, to the state, from the right which she has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. Vatt. 147; and also, lib. 1, c. 14, sec. 182. In reprisals, continues the same author, we seize on the property of the subject, just as we would that of the sovereign; everything that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. Lib. 2, c. 18, sec. 344. Now, if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain, that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

If, then, nothing but an actual removal, or a *bona fide* beginning to remove, can change a national character, acquired by domicil, and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject, what is there that does, or ought, to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent? It is contended, that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance; and that, until such election is made, his property ought to be protected from capture by the cruisers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it is founded upon a presumption that the person will certainly remove, before it can possibly be known, whether he may elect to do so or not. It is said, that this presumption ought to be made, because, upon receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance, when required to do so; nor will any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with these principles. It is not uncommon to stipulate in treaties, that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects either to remove or to remain. They are left free to choose for themselves; and when they have made their election, they claim the right of enjoying it under the treaty; but until the election is made, their former character continues unchanged.

Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted, by the cruisers of the other belligerent, to pass free, under the notion that he may elect to remove,upon notice of the war, and should arrive safe, what is to be done, in case the owner of it should afterwards elect to remain where he is? or, if captured and brought immediately to adjudication, it must, upon this doctrine, be acquited until the election to remain is made known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made. is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize courts of England, and which ought not, without strong reasons which may render them inapplicable to this country, to be disregarded by this court. The rule there, is, that the character of property, during war, cannot be changed *in transitu,* by any act of the party, subsequent to the capture. The rule, indeed, goes further: as to the correctness of which in its greatest extension, no opinion need now be given; but it may safely be affirmed, that this change cannot and ought not to be effected by an election of the owner and shipper of it, made subsequent to the capture, and more especially, after a knowledge of the capture is obtained by the owner. observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made bv the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war, and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruizers of his native and deserted country, it is not only free from capture by those of his adopted country, but it is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted.

It will be observed, that in the foregoing opinion respecting the nature and consequences of domicil, very few cases have been referred to. It was thought best not to interrupt the chain of argument, by stopping to examine cases; but faithfully to present the essential principles to be extracted from those which were cited at the bar, or which have otherwise come under the view of the court, and which applied to the subject. With what success this has been executed, is not for me to decide. But there are two or three cases which seem to be so applicable, and at the same time, so conclusive on the great points of this question, that it may not be improper briefly to notice them. In support of the general principles, that the national character of the owner at the time of capture, must decide his right to claim, and that a subject is condemned by it, even in the courts of his native country, without time being allowed to him to elect to remove, the following cases may be referred to.

In *The Boedes Lust*, 5 Rob. 247, it was decided, that the property of a resident of Demarara, shipped before hostilities of any kind had occurred between Holland and Great Britain, but which was captured, under an embargo declared by England upon Dutch property, as preparatory to war, which ensued soon after the seizure, was, by the retroactive effect of the war, applied to property so seized, to be considered as the property of an enemy taken in war. In this case, Sir W. SCOTT lays it down, that, where property is taken in a state of hostility, the universal practice has ever been, to hold it subject to condemnation, although the claimants may have become friends and subjects, prior to the adjudication. This case is somewhat stronger than the present, in the circumstance, that in that, the state of hostility, alleged to have existed at the time of capture, was made out, by considering the subsequent declaration of war as relating back to the time of seizure under the embargo, by which reference it was decided to be a hostile embargo, and of course, tantamount to an actual state of war. But this case also proves, not only that the hostile character of the property at the time of capture, establishes the legality of it, but that no future circumstance changing the hostile character of the claimant to that of a friend or subject, can entitle him to restitution. Whether the claimant, in this case, was a neutral or a British subject, does not appear. But if the former, it will not, it is presumed, be contended, that he is, upon the principles of national law, less to be favored in the courts of the belligerent, than a subject of that nation domiciled in the country of the adverse belligerent.

Whitehill's Case, however, referred to frequently in Robinson's Reports, comes fully up to the present, because he was a British subject, who had settled but a few days in the hostile country, but before he knew or could have known of the declaration of war; yet, as he went there with an intention to settle, this, connected with his residence, short as it was, fixed his national character, and identified him with the enemy of the country he had so recently quitted. The want of notice, and of an opportunity to extricate himself from a situation to which he had so recently and so innocently exposed himself, could not prevail to protect his property against the belligerent rights of his own country, and to save it from confiscation. There are many other strong cases upon these points, which I forbear to notice particularly, from an unwillingness to swell this opinion already too long.

The sentence of the court is as follows: This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof, it is decreed and ordered, that the sentence of the circuit court of Massachusetts condemning the one hundred casks of white lead claimed by Lenox & Maitland be, and the same is hereby affirmed with costs. And that the sentence of the said circuit court as to the claim of Magee & Jones to twenty-one trunks of merchandise be, and the same is hereby reversed and annulled; and that the said twenty-one trunks of merchandise be condemned to the captors; and that the sentence of the said circuit court as to the ship Venus claimed by Lenox & Maitland be, and the same is hereby reversed; and that the said ship Venus be condemned, the one-half thereof to the captors, and other half to the United States, under the order of the said circuit court. That the sentence of the said circuit court as to the claim of William Maitland to one-half of one hundred and fifty crates of earthenware, thirty-five cases and three casks of copper, nine pieces of cotton bagging and twenty and four-twentieths tons of coal, be, and the same is hereby reversed, and that the same be condemned to the captors; and that the sentence of the said circuit court, as to the claim of Alexander McGregor to one-half of one hundred and ninety-eight packages of merchandise, as the joint property of himself and Lenox & Maitland, and of the claim of William Maitland for one-fourth of the same goods, and of the claim of Alexander McGregor to twenty-five pieces of cotton bagging, and five trunks of merchandise, be, and the same is hereby reversed and annulled, and that the same be condemned to the captors; and that the said cause be remanded to the said circuit court for further proceedings to be had therein.

JURISDICTON AND CHOICE OF LAW.

IN GENERAL.

DEWITT v. BUCHANAN, 54 BARB. 31, (1868).

THIS is a demurrer to an answer. The action was for assault and battery, and the answer averred that at the time of committing the tort alleged in the complaint, the plaintiff and defendant were, and still are, subjects of Great Britain, and citizens and residents of Canada, and that the assault and battery complained of was committed in said province. The plaintiff demurred on the ground that the answer did not state facts constituting a defense.

G. W. Lewis, for the plaintiff.

Cantwell & Beaman, for the defendant.

JAMES, J. Actions for injuries to the person are transitory, and follow the person; and therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in our courts for a tort committed in another country, the same as on a contract made in another country.

It is now settled that the courts of this state have, and will entertain, jurisdiction of actions for personal injuries committed abroad, when both, or either of the parties, are citizens of the United States. (*Glen* v. *Hodges,* 9 *John.* 67. *Smith* v. *Bull,* 17 *Wend.* 323. *Lister* v. *Wright,* 2 *Hill,* 320. *Johnson* v. *Dalton,* 1 *Cowen,* 548.) I am aware that the New York Common Pleas, in *Molony* v. *Dows,* (8 *Abb.* 316,) held otherwise. But that case is not regarded as authority in this court. That decision was probably affected by the necessities of the case, overlooking the second section of the fourth article of the constitution of the United States.

The case of *Fabrigas* v. *Mostyn* (2 *Black.* 929) is always referred to on this question. In that case Lord Mansfield put, by way of illustration, the case of two Frenchmen fighting in France, and expressed a doubt of the jurisdiction of the courts in England in such case. But the reason given why the court would not have jurisdiction in such case has been held, in this state, not sufficient. (*See McIvor* v. *McCabe,* 26 *How. Pr.* 261, *and Gardner* v. *Thomas,* 14 *John.* 134.) In the latter case the action was for a tort committed on the high seas, on board a British vessel, both parties being British subjects; it originated in a justice's court, where the plaintiff had judgment. "The court held that although it might take cognizance of torts committed on the high seas, on board foreign vessels, when both parties were foreigners, yet on principles of policy it would often rest in the sound discretion of the court to afford jurisdiction, or not, according to the circumstances of each case." On this ground the judgment of the justice was reversed.

I have been unable to discover any *principle* on which the jurisdiction of the court in such a case as this can be denied; but as a question of policy, there are many reasons why jurisdiction should not be entertained. Unless for special reasons, non-resident foreigners should not be permitted the use of our courts to redress wrongs or enforce contracts, committed or made within their own territory. Our courts are organized and maintained at our own expense, for the use, benefit and protection of our citizens. Foreigners should not be invited to bring their matters here for litigation. But if a foreigner flee to this country, he may be pursued and prosecuted here.

Nothing appears in this case showing why jurisdiction should be entertained. It seems an ordinary case of assault and battery, committed in Canada, both parties still residing there, the defendant being casually here when arrested. It is most clearly against the interests of those living on the border for our courts to encourage or entertain jurisdiction of such actions. To do so would establish a practice which might often be attended with serious disadvantage to persons crossing the border. The true policy is to refuse jurisdiction in all such cases, unless for special reasons shown.

But the case is now before us upon demurrer to the sufficiency of a pleading, not on a motion to dismiss. In the former case the court has power to determine the sufficiency of the pleading only; in the latter case it has a discretion to adjudge whether it will continue jurisdiction of the action or not. In the former, no papers except the pleadings are properly before the court, and if any special reasons exist for retaining jurisdiction, they would not, and could not, properly appear; while in the latter case the special reasons, if any, could be set forth in the opposing affidavits.

From the foregoing it will be seen that the demurrer is well taken; that the answer does not set forth facts constituting a defense; that as a question of law this court has jurisdiction of torts committed in a foreign country, between non-resident foreigners; but as a matter of policy will only exercise it in its discretion, in exceptional cases.

There must be judgment for the plaintiff on the demurrer, with costs, with leave to the defendant to amend, or to move to dismiss the complaint on the grounds set forth in the answer.

MACHADO v. FONTES, 2 L. R. Q. B. D. 231, (1897).

APPEAL from Kennedy J. at chambers.

The plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the Plaintiff in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: "Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings."

The summons came before Kennedy J. in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.

Montague Lush, for the plaintiff, in support of the appeal. Although it may be that libel cannot in Brazil be made the subject of civil proceedings in which the plaintiff could recover damages, it is not an innocent act there, and can be made the subject of criminal proceedings. The plea is therefore bad, and should be struck out; for the authorities show that an action will lie in this country in respect of an act committed abroad if such act is actionable in this country, and not "justifiable" where committed: *Scott* v. *Lord Seymour* (1862, 1 H. & C. 219); *Phillips* v. *Eyre* (L. R. 6 Q. B. 1, 28); *The M. Moxham* (1 P. D. 107); *The Halley* 1868, L. R. 2 P. C. 193).

Joseph Walton, Q. C. and *A. J. Ashton,* for the defendant. The plea amounts to this: that the publication of the alleged libel could not be made the subject of an action for damages in Brazil, and the defendant contends that if not actionable there it is not actionable here; and it is no answer to say that if there has been a libel there the State might cause criminal proceedings to be instituted in respect of it. The question as to whether the alleged tort is or is not actionable in Brazil is one of Brazilian law, and the proper course would be to send out a commission to that country for the purpose of inquiring into and ascertaining what the law on the subject is, instead of deciding the question on the materials now before the Court; and if it turns out that the plaintiff individually cannot by any civil proceedings in Brazil make the defendant liable in respect of this alleged libel, no action will lie here, and the plea will be good. There is nothing in the cases cited at variance with this.

[They referred to 1 Smith's Leading Cases, 10th ed. p. 605; notes to *Mostyn v. Fabrigas.* (1774, 1 Cowp. 161.)]

Montague Lush, in reply.

Lopes, L. J. I am of opinion that this appeal ought to be allowed. [The Lord Justice then referred to the facts, and, after reading the plea, continued:—]

Now that plea, as it stands, appears to me merely to go to the remedy. It says, in effect, that in this case no action in which damages could be recovered would lie in Brazil; and, assuming that any damages could be recovered in Brazil, they would be special damages only. Mr. Walton contends that that is not the meaning of the plea: that the plea is intended to raise a larger question than that, and to say that libel cannot be made the subject of any civil proceedings at all in Brazil, but is only the subject-matter of criminal proceedings; and, for the purposes of what I am about to say, I will assume that to be so.

Now the principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful—I use the word "wrongful" deliberately—both by the law of this country, and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of *Phillips* v. *Eyre* (L. R. 6 Q. B. 1) Willes J. lays down very distinctly what the requisites are in order to found such an action. He says this (L. R. 6 Q. B. 1, at p. 28): "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England . . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Then in *The M. Moxham* (1 P. D. 107) James L. J., in the course of his judgment, uses these words (1 P. D. 107, at p. 111): "It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this Court will take into consideration that state of the law—that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here."

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies, for it complies with both of the requirements which are laid down by Willes J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue.

Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.

It is contended that it would be much better that this question should not be decided at the present time, but that a commission should go to Brazil, and that the Brazilian law should be inquired into. If our view is correct, it seems to me that that would be a great waste of time and money, because, having regard to the authorities I have mentioned, this plea is absolutely bad, and ought to be struck out.

Rigby, L. J. I am of the same opinion. I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

Willes J., in *Phillips* v. *Eyre* (L. R. 6 Q. B. 1), was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be "justifiable" by the law of the place where it was done.

It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes J. in *Phillips* v. *Eyre* (L. R. 6 Q. B. 1); and in the case of *The M. Moxham* (1 P. D. 107) all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner; and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case.

I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shewn to be justified or excused in the country where it was published. James L. J. states in *The M. Moxham* (1 P. D. 107) what the settled law is. Mellish L. J. is quite as clear upon that point as James L. J. in laying down the general rule; and Baggallay L. J. also takes the same view. We start, then, from this: that the act in question is prima facie actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

Appeal Allowed.

Solicitors: *Grant, Bulcraig & Co., for Parker, Eyre & Moorhouse, Manchester; Chester & Co., for Crofton, Craven & Worthington, Manchester.*

W. W. K.

PENAL LAWS.

HUNTINGTON v. ATTRILL, 146 U. S. 657, (1892).

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed March 21, 1888, in the Circuit Court of Baltimore City, by Collis P. Huntington, a resident of New York, against the Equitable Gas Light Company of Baltimore, a corporation of Maryland, and against Henry Y. Attrill, his wife and three daughters, all residents of Canada, to set aside a transfer of stock in that company, made by him for their benefit and in fraud of his creditors, and to charge that stock with the payment of a judgment recovered by the plaintiff against him in the State of New York, upon his liability as a director in a New York corporation, under the statute of New York of 1875, c. 611, the material provisions of which are copied in the margin.

The bill alleged that on June 15, 1886, the plaintiff recovered, in the Supreme Court of the State of New York, in an action brought by him against Attrill on March 21, 1883, a judgment for the sum of $100,240, which had not been paid, secured or satisfied; and that the cause of action on which that judgment was recovered was as follows: On February 29, 1880, the Rockaway Beach Improvement Company, Limited, of which Attrill was an incorporator and a director, became a corporation under the law of New York, with a capital stock of $700,000. On June 15, 1880, the plaintiff lent that company the sum of $100,000, to be repaid on demand. On February 26, 1880, Attrill was elected one of the directors of the company, and accepted the office, and continued to act as a director until after January 29, 1881. On June 30, 1880, Attrill, as a director of the company, signed and made oath to, and caused to be recorded, as required by the law of New York, a certificate, which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in; and by making such a false certificate became liable, by the law of New York, for all the debts of the company contracted before January 29, 1881, including its debt to the plaintiff. On March 8, 1882, by proceedings in a court of New York, the corporation was declared to be insolvent and to have been so since July, 1880, and was dissolved. A duly exemplified copy of the record of that judgment was annexed to and made part of the bill.

The bill also alleged that "at the time of its dissolution as aforesaid, the said company was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the State of New York all the stockholders of the company were liable to pay all its debts, each to the amount of the stock held by him, and the defendant, Henry Y. Attrill, was liable at said date and on April 14, 1882, as such stockholder, to the amount of $340,000, the amount of stock held by him, and was on both said dates also severally and directly liable as a director, having signed the false report above mentioned, for all the debts of said company contracted between February 26, 1880, and January 29, 1881, which debts aggregate more than the whole value of the property owned by said Attrill."

The bill further alleged that Attrill was in March, 1882, and had ever since remained, individually liable in a large amount over and above the debts for which he was liable as a stockholder and director in the company; and that he was insolvent, and had secreted and concealed all his property for the purpose of defrauding his creditors.

The bill then alleged that in April, 1882, Attrill acquired a large amount of stock in the Equitable Gas Light Company of

Baltimore, and forthwith transferred into his own name as trustee for his wife 1000 shares of such stock, and as trustee for each of his three daughters 250 shares of the same, without valuable consideration, and with intent to delay, hinder and defraud his creditors, and especially with the intent to delay, hinder and defraud this plaintiff of his lawful suits, damages, debts and demands against Attrill arising out of the cause of action on which the aforesaid judgment was recovered, and out of the plaintiff's claim against him as a stockholder; that the plaintiff in June, 1880, and ever since was domiciled and resident in the State of New York, and that from February, 1880, to December 6, 1884, Attrill was domiciled and resident in that State, and that his transfers of stock in the gas company were made in the city of New York where the principal office of the company then was, and where all its transfers of stock were made; and that those transfers were, by the laws of New York, as well as by those of Maryland, fraudulent and void as against the creditors of Attrill, including the creditors of the Rockaway Company, and were fraudulent and void as against the plaintiff.

The bill further, by distinct allegations, averred that those transfers, unless set aside and annulled by a court of equity, would deprive the plaintiff of all his rights and interests of every sort therein, to which he was entitled as a creditor of Attrill at the time when those fraudulent transfers were made; and "that the said fraudulent transfers were wholly without legal consideration, were fraudulent and void, and should be set aside by a court of equity."

The bill prayed that the transfer of shares in the gas company be declared fraudulent and void, and executed for the purpose of defrauding the plaintiff out of his claim as existing creditor; that the certificates of those shares in the name of Attrill as trustee be ordered to be brought into court and cancelled; and that the shares "be decreed to be subject to the claim of this plaintiff on the judgment aforesaid," and to be sold by a trustee appointed by the court, and new certificates issued by the gas company to the purchasers; and for further relief.

One of the daughters demurred to the bill, because it showed that the plaintiff's claim was for the recovery of a penalty against Attrill arising under a statute of the State of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the State of Maryland.

By a stipulation of counsel, filed in the cause, it was agreed that, for the purposes of the demurrer, the bill should be treated as embodying the New York statute of June 21, 1875; and that the Rockaway Beach Improvement Company, Limited, was incorporated under the provisions of that statute.

The Circuit Court of Baltimore City overruled the demurrer. On appeal to the Court of Appeals of the State of Maryland, the order was reversed, and the bill dismissed. 70 Maryland, 191.

The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that State and in Maryland, a penalty which could not be enforced in the State of Maryland; and that the judgment obtained in New York for this penalty, while it "merged the original cause of action so that a suit cannot be again maintained upon it," and "is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings," yet did not change the nature of the transaction, but, within the decision of this court in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, was in its "essential nature and real foundation" the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the State in which it was rendered. pp. 193-198.

The court then took up the clause of the bill, above quoted, in which it was sought to charge Attrill as originally liable under the statute of New York, both as a stockholder and as a director; and observing that "this liability is asserted to exist independently of the judgment," summarily disposed of it, upon the grounds that it could not attach to him as a stockholder, because he had not been sued, as required by the New York statute, within two years after the plaintiff's debt became due; nor as a director, because "the judgment against Attrill for having made the false report certainly merges all right of action against him on this account;" but that, if he was liable at the times and on the grounds "mentioned in this clause of the bill," this liability was barred by the statute of limitations of Maryland. pp. 198, 199.

Having thus decided against the plaintiff's claim under his judgment, upon the single ground that it was for a penalty under the statute of New York, and therefore could not be enforced in Maryland; and against any original liability under the statute, for various reasons; the opinion concluded: "Upon the whole, it appears to us that the complainant has no cause of action, which he can maintain in this State." p. 199.

Judge Stone, with whom Judge McSherry concurred, dissented from the opinion of the majority of the court, upon the ground that it did not give due effect to the act of Congress, passed in pursuance of the Constitution of the United States, and providing that the records of judgments rendered by a court of any State shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State whence they are taken. Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905. He began his opinion by saying: "I look upon the principal point as a Federal question, and am governed in my views more by my understanding of the decisions of the Supreme Court of the United States than by the decisions of the state courts." And he concluded thus: "I think the Supreme Court, in 127 U. S., meant to confine the operation of the rule that no country will execute the penal laws of another to such laws as are properly classed as criminal. It is not very easy to give any brief definition of a criminal law. It may perhaps be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and which the

State alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizens to claim damages for its nonperformance, are not criminal. If all the laws of the latter description are held penal in the sense of criminal, that clause in the Constitution which relates to records and judgments is of comparatively little value. There is a large, and constantly increasing, number of cases that may in one sense be termed penal, but can in no sense be classed as criminal. Examples of these may be found in suits for damages for negligence in causing death, for double damages for the injury to stock where railroads have neglected the state laws for fencing in their tracks, and the liability of officers of corporations for the debts of the company by reason of their neglect of a plain duty imposed by statute. I cannot think that judgments on such claims are not within the protection given by the Constitution of the United States. I therefore think the order in this case should be affirmed." pp. 200-205.

A writ of error was sued out by the plaintiff, and allowed by the Chief Justice of the Court of Appeals of Maryland, upon the ground "that the said Court of Appeals is the highest court of law or equity in the State of Maryland, in which a decision in the said suit could be had; that in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under said Constitution and statutes; and that in said suit there is drawn in question the validity of a statute of and an authority exercised under the United States, and the decision is against the validity of such statute and of such authority."

It thus appears that the judgment recovered in New York was made the foremost ground of the bill, was fully discussed and distinctly passed upon by the majority of the Court of Appeals of Maryland, and was the only subject of the dissenting opinion; and that the court, without considering whether the validity of the transfers impeached as fraudulent was to be governed by the law of New York, or by the law of Maryland; and without a suggestion that those transfers, alleged to have been made by Attrill with intent to delay, hinder and defraud all his creditors, were not voidable by subsequent, as well as by existing creditors, or that they could not be avoided by the plaintiff, claiming under the judgment recovered by him against Attrill after those transfers were made; declined to maintain his right to do so by virtue of that judgment, simply because the judgment had, as the court held, been recovered in another State in an action for a penalty.

The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this court has jurisdiction on this writ of error. *Green* v. *Van Buskirk,* 5 Wall. 307, 311; *Crapo* v. *Kelly,* 16 Wall. 610, 619; *Dupasseur* v. *Rochereau,* 21 Wall. 130, 134; *Crescent City Co.* v. *Butchers' Union,* 120 U. S. 141, 146, 147; *Cole* v. *Cunningham,* 133 U. S. 107; *Carpenter* v. *Strange,* 141 U. S. 87, 103.

In order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law, stated by Chief Justice Marshall in the fewest possible words: "The courts of no country execute the penal laws of another." *The Antelope,* 10 Wheat. 66, 123. In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word "penal" in our language.

In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws. *United States* v. *Reisinger,* 128 U. S. 398, 402; *United States* v. *Chouteau,* 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. In the words of Chief Justice Marshall: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party." *Tayloe* v. *Sandiford,* 7 Wheat. 13, 17.

Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be "penal against the hundred, but certainly remedial as to the sufferer." *Hyde* v. *Cogan,* 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. *Bones* v. *Booth,* 2 W. Bl. 1226; *Brandon* v. *Pate,* 2 H. Bl. 308; *Grace* v. *M'Elroy,* 1 Allen, 563; *Read* v. *Stewart,* 129 Mass. 407, 410; *Cole* v. *Groves,* 134 Mass. 471. As said by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, "it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action." *Woodgate* v. *Knatchbull,* 2 T. R. 148, 154; *Read* v. *Chelmsford,* 16 Pick. 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be "not like a penal law where a punishment is imposed for a crime," but "rather as a remedial than a penal law," because "the act indeed does give a penalty, but it is to the party grieved." *Lake* v. *Smith,* 1 Bos. & Pul. (N. R.) 174, 179, 180, 181; *Wilkinson* v. *Colley,* 5 Burrow, 2694, 2698. So in an action given by a statute to a traveller injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offence, or to conclude against the form of the statute, because, as Chief Justice Shaw said: "The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." *Reed* v. *Northfield,* 13 Pick. 94, 100, 101.

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs.* The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors.*" 3 Bl. Com. 2.

Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States. The general rules of international comity upon this subject were well summed up, before the American Revolution, by Chief Justice De Grey, as reported by Sir William Blackstone: "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequuntur forum rei.*" *Rafael* v. *Verelst,* 2 W. B. 1055, 1058.

Crimes and offences against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them, except by way of extradition to surrender offenders to the State whose laws they have violated, and whose peace they have broken.

Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession. Whether actions to recover pecuniary damages for trespasses to real estate, "of which the causes," as observed by Mr. Westlake (Private International Law, 3d ed. p. 213), "could not have occurred elsewhere than where they did occur," are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as affording a personal remedy. By the common law of England, adopted in most of the States of the Union, such actions are regarded as local, and can be brought only where the land is situated. *Doulson* v. *Matthews,* 4 T. R. 503; *McKenna* v. *Fisk,* 1 How. 241, 248. But in some States and countries they are regarded as transitory, like other personal actions; and whether an action for trespass to land in one State can be brought in another State depends on the view which the latter State takes of the nature of the action. For instance, Chief Justice Marshall held that an action could not be maintained in Virginia, by whose law it was local, for a trespass to land in New Orleans. *Livingston* v. *Jefferson,* 1 Brock. 203. On the other hand, an action for a trespass to land in Illinois, where the rule of the common law prevailed, was maintained in Louisiana, Chief Justice Eustis saying: "The present action is, under our laws, a personal action, and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought." *Holmes* v. *Barclay,* 4 La. Ann. 63. And in a very recent English case, in which the judges differed in opinion upon the question whether, since local venue has been abolished in England, an action can be maintained there for a trespass to land in a foreign country, all agreed that this question depended on the law of England. *Companhia de Mocambique* v. *British South Africa Co.* (1892) 2 Q. B. 358. See also *Cragin* v. *Lovell,* 88 N. Y. 258; *Allin* v. *Connecticut River Lumber Co.,* 150 Mass. 560.

In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, *The Halley,* L. R. 2 P. C. 193, 204; *Phillips* v. *Eyre,* L. R. 6 Q. B. 1, 28, 29; *The M. Moxham,* 1 P. D. 107, 111; *Wooden* v. *Western New York & Pennsylvania Railroad,* 126 N. Y. 10; *Ash* v. *Baltimore & Ohio Railroad,* 72 Maryland 144. But such is not the law of this court. By our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought. *Smith* v. *Condry,* 1 How. 28; *The China,* 7 Wall. 53, 64; *The Scotland,* 105 U. S. 24, 29; *Dennick* v. *Railroad Co.,* 103 U. S. 11; *Texas & Pacific Railway* v. Cox, 145 U. S. 593.

Upon the question what are to be considered penal laws of one country, within the international rule which forbids such laws to be enforced in any other country, so much reliance was placed by each party in argument upon the opinion of this court in *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, that it will be convenient to quote from that opinion the principal propositions there affirmed:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." p. 290.

"The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered." p. 291.

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." pp. 292, 293.

"The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State." p. 299.

Such were the grounds upon which it was adjudged in that case that this court, under the provision of the Constitution giving it original jurisdiction of actions between a State and citizens of another State, had no jurisdiction of an action by a State upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another State for a pecuniary penalty for a violation of its municipal law.

Upon similar grounds, the courts of a State cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States. *Martin* v. *Hunter,* 1 *Wheat.* 304, 330, 337; *United States* v. *Lathrop,* 17 Johns. 4, 265; *Delafield* v. *Illinois,* 2 Hill (N. Y.) 159, 169; *Jackson* v. *Rose,* 2 Virg. Cas. 34; *Ely* v. *Peck,* 7 Conn. 239; *Davison* v. *Champlin,* 7 Conn. 244; *Haney* v. *Sharp,* 1 Dana, 442; *State* v. *Pike*, 15 N.H. 83, 85; *Ward* v. *Jenkins,* 10 Met. 583, 587; 1 Kent Com. 402-404. The only ground ever suggested for maintaining such suits in a state court is that the laws of the United States are in effect laws of each State. *Claflin* v. *Houseman,* 98 U. S. 130, 137; Platt, J., in *United States* v. *Lathrop,* 17 Johns. 22; *Ordway* v. *Central Bank,* 47 Maryland, 217. But in *Claflin* v. *Houseman* the point adjudged was that an assignee under the bankrupt law of the United States could assert in a state court the title vested in him by the assignment in bankruptcy; and Mr. Justice Bradley, who delivered the opinion in that case, said the year before, when sitting in the Circuit Court, and speaking of a prosecution in a court of the State of Georgia for perjury committed in that State in testifying before a commissioner of the Circuit Court of the United States, "It would be a manifest incongruity for one sovereignty to punish a person for an offence committed against the laws of another sovereignty." *Ex parte Bridges,* 2 Woods, 428, 430. See also *Loney's case,* 134 U. S. 372.

Beyond doubt, (except in cases removed from a state court in obedience to an express act of Congress in order to protect rights under the Constitution and laws of the United States), a Circuit Court of the United States cannot entertain jurisdiction of a suit in behalf of the State, or of the people thereof, to recover a penalty imposed by way of punishment for a violation of a statute of the State, "the courts of the United States," as observed by Mr. Justice Catron, delivering a judgment of this court, "having no power to execute the penal laws of the individual States." *Gwin* v. *Breedlove,* 2 How. 29, 36, 37; *Gwin* v. *Barton,* 6 How. 7; *Iowa* v. *Chicago &c. Railway,* 37 Fed. Rep. 407; *Ferguson* v. *Ross,* 38 Fed. Rep. 161; *Texas* v. *Day Land & Cattle Co.,* 41 Fed. Rep. 228; *Dey* v. *Chicago &c. Railway,* 45 Fed. Rep. 82.

For the purposes of extra-territorial jurisdiction, it may well be that actions by a common informer, called, as Blackstone says, "popular actions, because they are given to the people in general," to recover a penalty imposed by statute for an offence against the law, and which may be barred by a pardon granted before action brought, may stand on the same ground as suits brought for such a penalty in the name of the State or of its officers, because they are equally brought to enforce the criminal law of the State. 3 Bl. Com. 161, 162; 2 Bl. Com. 437, 438; *Adams* v. *Woods,* 2 Cranch, 336; *Gwin* v. *Breedlove,* above cited; *United States v. Connor,* 138 U S. 61, 66; *Bryant* v. *Ela, Smith* (N. H.) 396. And personal disabilities imposed by the law of a State, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person —such as attainder, or infamy, or incompetency of a convict to testify, or disqualification of the guilty party to a cause of divorce for adultery to marry again—are doubtless strictly penal, and therefore have no extra-territorial operation. Story on Conflict of Laws, §§ 91, 92; Dicey on Domicil, 162; *Folliott* v. *Ogden,* 1 H. Bl. 123, and 3 T. R. 726; *Logan* v. *United States,* 144 U. S. 263, 303; *Dickson* v. *Dickson,* 1 Yerger, 110; *Ponsford* v. *Johnson,* 2 Blatchford, 15; *Commonwealth* v. *Lane,* 113 Mass. 458, 471; *Van Voorhis* v. *Brintnall,* 86 N. Y. 18, 28, 29.

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in *Dennick v. Railroad Co.,* 103 U. S. 11.

In that case, it was held that, by virtue of a statute of New Jersey making a person or corporation, whose wrongful act, neglect or default should cause the death of any person, liable to an action by his administrator, for the benefit of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the neglect and the death took place in New Jersey, might, upon general principles of law, be maintained in a Circuit Court of the United States held in the State of New York by an administrator of the deceased, appointed in that State.

Mr. Justice Miller, in delivering judgment, said: "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State; but *when the* act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." 103 U. S. 17, 18.

That decision is important as establishing two points: 1st. The court considered "criminal laws," that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extra-territorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resuting to the family of the deceased, might be enforced in a Circuit Court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. The decision was approved and followed at the last term in *Texas &Pacific Railway* v. *Cox,* 145 U. S. 593, 605, where the Chief Justice, speaking for the whole court, after alluding to cases recognizing the rule where the laws of both jurisdictions are similar, said: "The question, however, is one of general law, and we regard it as settled in *Dennick* v. *Railroad Co.*"

That decision has been also followed in the courts of several States. *Herrick* v. *Minneapolis & St. Louis Railway,* 31 Minnesota, 11; *Chicago &c. Railroad* v. *Doyle,* 60 Mississippi, 977; *Knight* v. *West Jersey Railroad,* 108 Penn. St. 250; *Morris* v. *Chicago &c. Railway,* 65 Iowa, 727; *Missouri Pacific Railway v. Lewis,* 24 Nebraska, 848; *Higgins* v. *Central New England Railroad,* 155 Mass., 176.

In the case last cited, a statute of Connecticut having provided that all actions for injuries to the person, including those resulting instantaneously or otherwise in death, should survive; and that for an injury resulting in death from negligence the executor or administrator of the deceased might maintain an action to recover damages not exceeding $5000, to be distributed among his widow and heirs in certain proportions; it was held that such an action was not a penal action, and might be maintained under that statute in Massachusetts by an administrator, appointed there, of a citizen thereof, who had been instantly killed in Connecticut by the negligence of a railroad corporation; and the general principles applicable to the case were carefully stated as follows: "These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction." 155 Mass. 180.

The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or *quasi* criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers; and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country.

The decisions of the Court of Appeals of New York, so far as they have been brought to our notice, fall short of holding that the liability imposed upon the officers of the corporation by such statutes is a punishment or penalty which cannot be enforced in another State.

In *Garrison* v. *Howe,* the court held that the statute was so far penal that it must be construed strictly, and therefore the officers could not be charged with a debt of the corporation, which was neither contracted nor existing during a default in making the report required by the statute; and Chief Justice Denio, in delivering judgment, said: "If the statute were simply a remedial one, it might be said that the plaintiff's case was within its equity; for the general object of the law doubtless was, beside enforcing the duty of making reports for the benefit of all concerned, to enable parties proposing to deal with the corporation to see whether they could safely do so." "But the provision is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within the language." 17 N. Y. 458, 465, 466.

In *Jones* v. *Barlow,* it was accordingly held that officers were only liable for debts actually due, and for which a present right of action exists against the corporation; and the court said: "Although the obligation is wholly statutory, and adjudged to be a penalty, it is in substance, as it is in form, a remedy for the collection of the corporate debts. The act is penal as against the defaulting trustees, but is remedial in favor of creditors. The liability of defaulting trustees is measured by the obligation of the company, and a discharge of the obligations of the company, or a release of the debt, bars the action against the trustees." 62 N. Y. 202, 205, 206.

The other cases in that court, cited in the opinion of the Court of Appeals of Maryland in the present case, adjudged only the following points: Within the meaning of a statute of limitations applicable to private actions only, the action against an officer is not "upon a liability created by statute, other than a penalty or forfeiture," which would be barred in six years, but is barred in three years as "an action upon a statute for a penalty or forfeiture where action is given to the party aggrieved," because the provisions in question, said the court, "impose a penalty, or a liability in that nature." *Merchants' Bank* v. *Bliss*, 35 N. Y. 412, 417. A count against a person as an officer for not filing a report cannot be joined with one against him as a stockholder for debts contracted before a report is filed, that being "an action on contract." *Wiles* v. *Suydam,* 64 N. Y. 173, 176. The action against an officer is an action *ex delicto,* and therefore does not survive against his personal representatives. *Stokes* v. *Stickney,* 96 N. Y. 323.

In a later case than any of these, the court, in affirming the very judgment now sued on, and adjudging the statute of 1875 to be constitutional and valid, said that "while liability within the provision in question is in some sense penal in its character, it may have been intended for the protection of creditors of corporations created pursuant to that statute." *Huntington* v. *Attrill,* 118 N. Y. 365, 378. And where such an action against an officer went to judgment before the death of either party, it was decided that "the original wrong was merged in the judgment, and that thus became property with all the attributes of a judgment in an action *ex contractu;*" and that if, after a reversal of judgment for the plaintiff, both parties died, the plaintiff's representatives might maintain an appeal from the judgment of reversal, and have the defendant's representatives summoned in. *Carr* v. *Rischer,* 119 N. Y. 117, 124.

We do not refer to these decisions as evidence in this case of the law of New York, because in the courts of Maryland that law could only be proved as a fact, and was hardly open to proof on the demurrer, and, if not proved in those courts, could not be taken judicial notice of by this court on this writ of error. *Hanley* v. *Donoghue,* 116 U. S. 1; *Chicago & Alton Railroad* v. *Wiggins Ferry,* 119 U. S. 615; *Wernwag* v. *Pawling,* 5 Gill & Johns. 500, 508; *Coates* v. *Mackey,* 56 Maryland, 416, 419. Nor, for reasons to be stated presently, could those decisions, in any view, be regarded as concluding the courts of Maryland, or this court, upon the question whether this statute is a penal law in the international sense. But they are entitled to great consideration, because made by a court of high authority, construing the terms of a statute with which it was peculiarly familiar; and it is satisfactory to find no adjudication of that court inconsistent with the view which we take of the liability in question.

That court and some others, indeed, have held that the liability of officers under such a statute is so far in the nature of a penalty, that the creditors of the corporation have no vested right therein, which cannot be taken away by a repeal of the statute before judgment in an action brought thereon. *Victory Co.* v. *Beecher,* 97 N. Y. 651, and 26 Hun, 48; *Union Iron Co.* v. *Pierce,* 4 Bissell, 327; *Breitung* v. *Lindauer,* 37 Michigan, 217, 230; *Gregory* v. *German Bank,* 3 Colorado, 332. But whether that is so, or whether, within the decision of this court *Hawthorne* v. *Calef,* 2 Wall. 10, 23, such a repeal so affects the security which the creditor had when his debt was contracted, as to impair the obligation of his contract with the corporation, is aside from the question now before us.

It is true that the courts of some States, including Maryland, have declined to enforce a similar liability imposed by the statute of another State. But, in each of those cases, it appears to have been assumed to be a sufficient ground for that conclusion, that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law in the strict, primary and international sense. *Derrickson* v. *Smith,* 3 Dutcher, (27 N. J. Law), 166; *Halsey* v. *McLean,* 12 Allen, 438; *First National Bank* v. *Price,* 33 Maryland, 487.

It is also true that in *Steam Engine Co.* v. *Hubbard,* 101 U. S. 188, 192, Mr. Justice Clifford referred to those cases by way of argument. But in that case, as well as in *Chase* v. *Curtis,* 113 U. S. 452, the only point adjudged was that such statutes were so far penal that they must be construed strictly; and in both cases jurisdiction was assumed by the Circuit Court of the United States, and not doubted by this court, which could hardly have been if the statute had been deemed penal within the maxim of international law. In *Flash* v. *Conn,* 109 U. S. 371, the liability sought to be enforced under the statute of New York was the liability of a stockholder arising upon contract; and no question was presented as to the nature of the liability of officers.

But in *Hornor* v. *Henning,* 93 U. S. 228, this court declined to consider a similar liability of officers of a corporation in the district of Columbia as a penalty. See also *Neal* v. *Moultrie,* 12 Georgia, 104; *Cady* v. *Sanford,* 53, Vermont, 632, 639, 640; *Nickerson* v. *Wheeler,* 118 Mass. 295, 298; *Post* v. *Toledo &c. Railroad,* 144 Mass. 341, 345; *Woolverton* v. *Taylor,* 132 Illinois, 197; Morawetz on Corporations (2d ed.) § 908.

The case of *Missouri Pacific Railway* v. *Humes,* 115 U. S. 512, on which the defendant much relied, related only to the authority of the legislature of a State to compel railroad corporations, neglecting to provide fences and cattle-guards on the lines of their roads, to pay double damages to the owners of cattle injured by reason of the neglect; and no question of the jurisdiction of the courts of another State to maintain an action for such damages was involved in the case, suggested by counsel, or in the mind of the court.

The true limits of the international rule are well stated in the decision of the Judicial Committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff against Attrill in the Province of Ontario upon the judgment to enforce which the present suit was brought. The Canadian judges, having in evidence before them some of the cases in the Court of Appeals of New York, above referred to, as well as the testimony of a well known lawyer of New York that such statutes were, and had been held by that court to be, strictly penal and punitive, differed in opinion upon the question whether the statute of New York was a penal law which could not be enforced in another country, as well as upon the question whether the view taken by the courts of New York should be conclusive upon foreign courts, and finally gave judgment for the defendant. *Huntington* v. *Attrill,* 17 Ontario, 245, and 18 Ontario App. 136.

In the Privy Council, Lord Watson, speaking for Lord Chancellor Halsbury and other judges, as well as for himself, delivered an opinion in favor of reversing the judgment below, and entering a decree for the appellant, upon the ground that the action "was not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York for punishment of an offence against their municipal law." The fact that that opinion has not been found in any series of reports readily accessible in this country, but only in 8 Times Law Reports, 341, affords special reasons for quoting some passages.

"The rule" of international law, said Lord Watson, "had its foundation in the well recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of some one representing the public, were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex loci,* ought to be admitted in the courts of any other country. In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offences against the State; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs, which was the very essense of the international rule."

After observing that, in the opinion of the Judicial Committee, the first passage above quoted from *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 290, "disclosed the proper test for ascertaining whether an action was penal within the meaning of the rule," he added: "A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the State whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the state law as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offences against the State, unless their vindication rested with the State itself or with the Community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

He had already, in an earlier part of the opinion, observed: "Their lordships could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the State of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign court whose jurisdiction was invoked. Judicial decisions in the State where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced. and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case, and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament or being constrained to give effect to laws which were, in its own judgment, strictly penal."

In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess* v. *Seligman,* 107 U. S. 20, 33; *Texas & Pacific Railway* v. *Cox,* 145 U. S. 593, 605, above cited. If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. *New York Ins. Co.* v. *Hendren,* 92, U. S. 286; *Roth* v. *Ehman,* 107 U. S. 319. But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it. This was directly adjudged in *Wisconsin* v. *Pelican Ins. Co.,* above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38. So if the state court, in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.

Whether the Court of Appeals of Maryland gave full faith and credit to the judgment recovered by this plaintiff in New York depends upon the true construction of the provisions of the Constitution and of the act of Congress upon that subject.

The provision of the Constitution is as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Art. 4, sect. 1.

This clause of the Constitution, like the less perfect provision on the subject in the Articles of Confederation, as observed by Mr. Justice Story, "was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them;" and had three distinct objects: first, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other State; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated. Story on the Constitution, §§ 1307, 1308.

Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken." Rev. Stat. § 905, re-enacting Act of May 26, 1790, c. 11, 1 Stat. 122.

These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties. *D'Arcy* v. *Ketchum,* 11 How. 165; *Thompson* v. *Whitman,* 18 Wall. 457. And they confer no new jurisdiction on the courts of any State; and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature, that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other State than that in which the penalty was incurred. *Wisconsin* v. *Pelican Ins. Co.,* above cited.

Nor do these provisions put the judgments of other States upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the State in which they are sued on, pleaded, or offered in evidence. *McElmoyle* v. *Cohen,* 13 Pet. 312, 325. But when duly pleaded and proved in a court of that State, they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the State in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States. *Christmas* v. *Russell,* 5 Wall. 290; *Green* v. *Van Buskirk,* 5 Wall. 307, and 7 Wall. 139; *Insurance Co.* v. *Harris,* 97 U. S. 331, 336; *Crescent City Co.* v. *Butchers' Union,* 120 U. S. 141, 146, 147; *Carpenter* v. *Strange,* 141 U. S. 87.

The judgment rendered by a court of the State of New York, now in question, is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment *inter partes.* The Court of Appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit and effect to which it was entitled under the Constitution and laws of the United States.

Judgment reversed, and case remanded to the Court of Appeals of the State of Maryland for further proceedings not inconsistent with the opinion of this court.

STATUS OF MARRIAGE.

VAN VOORHIS v. BRINTNALL, 86 N. Y. 18, (1881).

Danforth, J. By this action the plaintiffs seek a construction of the will of Elias W. Van Voorhis deceased, and an adjudication as to the right under it of the defendant, Rose Van Voorhis. The questions turn upon these facts: The testator died in 1869, leaving a widow and three children, Elias, Sarah and

Barker. The widow and Elias were appointed executors. By the will a specific devise was made to his wife, and the residue of the estate given to the executors in trust, "so long as his wife should live," for the accumulation of income and payment by them as therein directed. By its *second* clause two-ninths part of this income was to be paid for the benefit of Barker, as follows: Four hundred dollars annually for the support of Ella Van Voorhis, and the same amount for the support of Elias William Van Voorhis, children of Barker, until they should respectively reach the age of twenty-one years, the remainder of said two-ninths to Barker. Before the commencement of this action Ella reached the age of twenty-one years. The *sixth* clause of the will provided that upon the death of the testator's wife all his property should be divided equally between his children above-named, share and share alike, and the issue of any deceased child should take the share his, her or their parent would have taken if then living. Elizabeth was then the wife of Barker and mother of Ella and Elias, his children. Afterward, and on the 19th of April, 1872, in consequence of proceedings begun by her, the Supreme Court of this State dissolved the marriage of Elizabeth and Barker, on the ground of his adultery, and also adjudged that it should not be lawful for him to marry again until her death. That event has not happened, but on the 10th of June, 1874, he married Ida L. Baron Schroeder at the city of New Haven, in the State of Connecticut. Both parties then resided in this State, and the trial court found as a fact "that they went to New Haven for the purpose of evading the New York law, for the reason that the said Barker Van Voorhis was prohibited from marrying again in this State." On the same day they returned to New York and continued to reside there until the death of Barker in 1880. Defendant Rose Van Voorhis was a child of that marriage, born in this State April 2, 1875. The trial court also found that the marriage was valid under the laws of Connecticut, but, from the facts above stated, that it was unll and void by the laws of this State. Rose, therefore, was adjudged illegitimate and not entitled to take under the will. It was also declared that the two-ninths of the income appropriated for the benefit of Barker (after deducting

$400 annually during the minority of Elias) were undisposed of and went by force of the statute of distributions to Elizabeth, his former wife, and her children. The plaintiffs, and Rose Van Voorhis and Sarah Brintnall, defendants, appealed to the General Term of the Supreme Court, where the judgment was affirmed. They now appeal to this court.

The plaintiffs and the defendant Sarah Brintnall object to so much of the judgment as disposes of the income set apart by the second clause of the will. They insist that Elizabeth, the former wife of Barker, has no concern with it. On the contrary, they say it should go to the testator's son Elias, and Sarah, his daughter, each taking one-third, and the remaining third to the children of Barker. This question was not presented by the complaint as one concerning which the executors had anv doubt, and they now claim that it was by inadvertence passed upon by the trial court. It would seem, therefore, that the attention of that court should have been called to it in some other way than by exception and appeal. As the case stands there is such a defect of parties as would make unavailing our decision if it should accord with the plaintiff's views. Elizabeth, the mother, is not before us and would yet have a right to be heard. Whether one released without fault on her part from the obligations of marriage may, upon the death of her former husband, have a share of his personal estate, and if so, whether it is to be measured by its condition at the time of the divorce or at his death, should not be determined in her absence. Our conclusion, however, upon the remaining question will lead to a new trial; and in the meantime such steps can be taken as the parties think fit to complete the record.

That question involves the civil *status* acquired by Barker Van Voorhis and Ida by the marriage in Connecticut. *First,* it is a general rule of law that a contract entered into in another State or country, if valid according to the law of that place, is valid everywhere (*The King of Spain* v. *Machado,* 4 Russ. 225; *Potter* v. *Brown,* 5 East, 130; Story's Conflict of Laws, § 242); and this, says Kent (2 Com. 454), "is *jure gentium,* and by tacit assent," and Lord BROUGHAM in *Warrender* v. *Warrender* (2 Cl. & Fin. 529, 530), declares that the courts of the country where the question arises, resort to the law of the country where the contract was made, not *ex comitati,* but *ex debito justitiae.* And coming to the case in hand, the rule recognizes as valid a marriage considered valid in the place where celebrated. (Story's Conflict of Laws, §§ 69, 79; *Connelly* v. *Connelly,* 2 Eng. L. & Eq. 570.) "We all know," say the court in that case, "that in questions of marriage contract, the *lex loci contractus* is that which is to determine the *status* of the parties," and also declare that this by consent of all nations is *jus gentium.* In *Dalrymple* v. *Dalrymple* (2 Hagg. Const. 54), it was held that a marriage good in Scotland though otherwise by the law of England, is valid in that country; and this was put upon the ground that the rights of the parties must be tried by reference to the law of the country where they originated. In *Scrimshire* v. *Scrimshire* (2 Hagg. Const. 395), the same principle is stated in different words. The court say, "All parties contracting gain a forum in the place where the contract is entered into." (*Warrender* v. *Warrender, supra; Lacon* v. *Higgins,* 1 Dow. & Ry. 38; *Butler* v. *Freeman,* 1 Amb. 303.) Not only is this the result of English decisions, but is believed to state the principle upon which the courts of many of our sister States have acted (*Greenwood* v. *Curtis,* 6 Mass. 358; *Medway* v. *Needham,* 16 id. 157; *Parton* v. *Hervey,* 1 Gray, 119; *Putnam, v. Putnam,* 8 Pick. 433; *Dickson* v. *Dickson,* 1 Yerg. 110; *Stevenson* v. *Gray,* 17 B. Monr. 193; *Fornshill* v. *Murray,* 1 Bland. Ch. 479); and by which our own, with few exceptions, have been governed. In *Decouche* v. *Savetier* (3 Johns. Ch. 210), Chancellor KENT says: "There is no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the *lex loci.*" In *Cropsey* v. *Ogden* (11 N. Y. 228), JOHNSON, J. says (p. 236): "By the universal practice of civilized nations the permission or prohibition of particular marriages of right belongs to the country where the marriage is to be celebrated." The court had before it the case of one who, having a former wife living, from whom he then had been divorced for adultery by him committed, married a second time in this State. His last marriage was held to be void under our statute prohibiting a second or other subsequent marriage of any person "during the life-time of any former husband or wife of such person." There the former marriage, his adultery, and the existence of his first wife established the condition or quality of the man. They were facts in his history, and brought him within the terms of our law. The general rule above stated was applied. The *lex loci* governed. But the court said it was not necessary for them to consider what would have been the effect of a marriage celebrated out of this State. Its attention was, however, directly brought to the statute relating to marriages, and the circumstances under which the remarks above quoted, and others seeming to discriminate between a marriage in this State and out of it, were made, render them the more significant. In *Haviland* v. *Halstead* (34 N. Y. 643), a person divorced for the same offense in this State promised in New Jersey to marry the plaintiff. He married another, and an action for the breach of this promise was brought here and failed. The parties resided in this State and contemplated the performance of the contract here. The court carefully distinguish the case so presented from one where a marriage had taken place in a foreign State. They assume that the latter would be treated as valid, although the parties had gone there with intent to evade the laws of this State, and citing *Medway* v. *Needham* (*supra*), say, the doctrine "in favor of marriage so contracted is founded on principles of policy to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live." Indeed the general doctrine is so well settled by the decisions of all courts and the reiteration of text writers as to become a maxim in the law, that one rule in these cases should be followed by all countries; that is, the law of the country where the contract is made. (Story, *supra,* 84; 2 Kent's Com. 91-92.) There are no doubt exceptions to this rule; cases, *first* of incest or polygamy coming within the prohibitions of natural law (*Wightman* v. *Wightman,* 4 Johns. Ch. 343; *Hutchins* v. *Kimmell* (31 Mich. 133; Story, *supra,* § 113 *a* [7th ed.]); *second,* of prohibition by positive law. It is contended by the learned counsel for the respondent that the judgment may be upheld upon the ground that the marriage is one of the latter class. The assertion, however, is left unsupported by argument or the citation of authorities. Its truth is not so self evident as to dispense with either, and the omission, coupled with our own examination, leads us to think that the courts have not yet spoken with a controlling voice in its favor. It is to be maintained if at all upon the prohibition in the judgment of divorce already referred to and the provisions of the statute which made the judgment proper. (*Graves* v. *Graves,* 2 Paige, 62). The question is not one of ethics or morality, but the extent of the authority of the statute as a rule of conduct. As a direct inquiry it is here for the first time. There are *dicta* and expressions having relation to it in *Cropsey* v. *Ogden,* and *Haviland* v. *Halstead* (*supra*), tending to confine the effect of the statutory prohibition and declaration of invalidity to second marriages within this State; but in neither case was the precise question before the court for judgment. In other courts of this State it has met with differing answers. In the Supreme Court, first department, *Marshall* v. *Marshall* (2 Hun, 238), by a divided court, and *Thorpe* v. *Thorpe* (Superior Court of New York city), following it, a marriage under similar circumstances was held void. The judgment now before us went upon the principal of *stare decisis,* the court below also following *Marshall* v. *Marshall* (*supra*); *Kerrison* v. *Kerrison,* Special Term, fourth department (8 Abb. N. C. 444), and *Matter of Webb* (1 Tucker, 372, [Surr. Ct.]) are to the contrary. To the latter class may be added *Ponsford* v. *Johnson,* before NELSON and BETTS, J. J. (2 Blatchf. 51). These decisions are irreconcilable, and any determination reached by us must overrule one class or the other. We are therefore at liberty to treat the subject as *res integra,* unaffected by any paramount authority, although greatly assisted by the reasoning of the learned judges who have taken part in those judgments.

The statutory provisions relied upon by the respondent are found in part 2, chap. 8 of the R. S., entitled "Of the domestic relations," and especially in those articles which treat "of husband and wife." (Tit. 1, arts. 1 to 5, vol. 2, p. 138.) The statute does not define marriage or introduce a new formula for the relation, but treats it as existing, and declares it shall continue "in this State" a civil contract (§1, chap. 8, tit. 1, art. 1, part 2), adopts the principles of the common law which renders invalid marriages between persons connected by certain lines of consanguinity (§ 3, id.), or who for want of age or understanding are incapable of consent, or who if capable have been induced to give it by fraud or force. (§4, id.) It then declares that no second marriage shall be contracted by any person during the life-time of any former husband or wife of such person, unless the marriage with such former husband or wife shall have been dissolved for some cause other than the adultery of such person, and that every marriage contracted contrary to this provision shall be absolutely void. (§ 5, id.) These circumstances are restated as grounds of divorce, and it is enacted that "whenever a marriage shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the life-time of the defendant, but no defendant convicted of adultery shall marry again until the death of the complainant." (§ 49, id., art. 3.) As originally enacted the same statute (Tit 1, *supra,* § 2), not only made the consent of parties essential, but limited the class to those "capable in law of contracting," and by its definition excluded males under seventeen and females under fourteen years of age. Although this provision has been repealed, it throws some light upon the legislative intent in devising the system of laws concerning husband and wife. Conditions were annexed not only to the duration, but the creation of this relation, and the frequency with which it might be formed. Certain persons are declared capable, others incapable of forming it, and still others must submit to its dissolution. In one instance, as in the case before us, it cannot be contracted with another while the first co-contractor is living. It is obvious that this last condition is in the nature of a penalty. (*Wait* v. *Wait,* 4 N. Y. 101; *Com.* v. *Lane,* 113 Mass. 471.) It forms no part of the relief sought by the injured party, has no tendency toward compensation, nor is it imposed to that end. It is restraint or puisnhment. (*West Cambridge* v. *Lexington,* 1 Pick. 506-508; *Clark* v. *Clark,* 8 Cush. 386.) The fact of adultery is in the language of the statute an "offense," the person committing it "a guilty person;" and when established by judgment he is said to be "convicted." He is, in consequence of it, deprived of a natural right of privilege which others enjoy. Moreover for violating this statutory provision he is at least rendered liable to fine and imprisonment, as for a misdemeanor (2 R. S., part 4, chap. 1, tit. 6, p. 696, §§ 39, 40); if not for felony under the provisions of article 2 of the same statute. (2 R. S. 687.) The opinion of WALWORTH, Chancellor, went to that extent in *Graves* v. *Graves* (2 Paige, 62); and although *People* v. *Hovey* (5 Barb. 121) is to the contrary, the measure of the offense is not now important, and the last case holds to the misdemeanor. To that extent the law is plain. The real question is whether such a statute furnishes an exception to the maxim "*Leges extra territorium non obligant.*" It is not necessary to assert that the power of the legislature is so limited that no law passed by it would accompany a citizen into other countries and there control or modify the legal effect of his actions. Nor need we deny that it might be so framed as to affect his person and subject him in this State to punishment for its violation elsewhere, upon his return to the jurisdiction of our courts. On the contrary, it is to be regarded as settled law that as all persons within its borders, whether citizens or aliens, are liable to be punished for any offense committed in this State against its laws, its citizens may also be punished for acts committed beyond its borders where there is a special provision of law declaring the act to be an offense, although committed out of the State. (Maxwell on Statutes, 119-128; *Cope* v. *Doherty*, 2 De G. & J. 624; 1 Burge's Col. & For. Laws 196.) So, also, may an act committed out of the State be made to affect an individual, whether citizen or foreigner, when he comes within its borders and does some other act of which our laws take notice. Nor are examples of legislation effecting these results wanting. The statute defining acts which constitute treason (Tit. 1, pt. 4, ch. 1, p. 657, vol. 2 R. S., § 2) illustrates the first: It subjects the offender to punishment, whether the act prohibited is done "in this State or elsewhere." That against dueling is an example of the second: It makes one who by previous engagement fights a duel without the jurisdiction of this State, and in so doing inflicts a wound upon any person, "whereof he shall die within this State," and every second engaged in such duel, guilty of murder within this State. And still more in point, as illustrating its manner of expression where the legislature intends to take cognizance of an act committed outside the limits of the State, or to impress upon the *status* of its citizen a condition of liability for such an act, are the provisions of the statute treating of offenses against "the public peace and public morals." (Tit. 5, pt. 4, ch. 1, art. 1, vol. 2, R. S.) After providing punishments for fighting duels, sending challenges, etc., in the most general terms, excluding no one from its condemnation, but, within the general maxim above quoted, having no extra-territorial force, comes a provision which by its special language attaches to the citizen, goes with him as he crosses the line of his State, and binds him with an obligation in what place soever he is. "If," it says (§ 5, id.), "any inhabitant of this State shall leave the same for the purpose of eluding the operation" of these provisions, and "shall give or receive any such challenge" * * * without this State, he shall be deemed guilty and subject to the like punishment as if the offense had been committed within this State. And we shall see later a provision similar to this, now forming part of the law relating to marriages in the State of Massachusetts. Another instance well shows by contrast the necessity of a declaration that the arm of the law shall be so extended. In proximity to the provisions I have quoted, in the next article (§ 8) is the statute "of unlawful marriages," defining bigamy and declaring its punishment; saying in general terms, "every person having a husband or wife living who shall marry any other person" (with exceptions of no moment here) shall be adjudged guilty of bigamy, providing (§ 10) that "an indictment may be found against any person for a second, third or other marriage herein prohibited, in the county in which he shall be apprehended, and the same proceedings had thereon 'as if the offense had been committed therein.'" Yet there are no enlarging words affixing themselves to the person of the citizen as in the statute before quoted, or bringing within its purview "a second or other marriage" contracted out of the State. And, therefore, on the trial of one who was indicted for bigamy, the second marriage having taken place in Canada, it was held, as early as 1855, by a court presided over by the late judge W. F. ALLEN, then a justice of the Supreme Court, that this statute had no application, that the second marriage was not an offense against the laws of this State, because they had no "extra-territorial force." (*The People* v. *Mosher*, 2 Par. Cr. Rep. 195.) In like manner, if Barker Van Voorhis had on his return to this State after accomplishing his second marriage, been indicted under the statutes to which I have referred, either for bigamy or for doing a prohibited act, it would necessarily follow that the indictment would fail. Yet the words of the statute are general; in themselves they contain no limitation. But we have been referred to no case, and I think none can be found, where such general words have been interpreted so as to extend the action of a statute beyond the territorial authority of the legislature; and it is only by extending it that our courts can take cognizance of acts there committed. Of the third class, an example is afforded by our statute defining punishment for a second offense (§ 8, p. 699, vol. 2, R. S., pt. 4, ch. 1, tit. 7.) "If any person," it says, convicted of any offense punishable by imprisonment, etc., shall afterward be convicted of any offense, he shall be punished in a mode prescribed. It is evident that these words are general and taken literally would apply to "any person" committing an offense in or out of the State. Applying the mode of construction contended for by the respondent, nothing more would be necessary. But the legislature show that such is not its meaning. By section 10 they declare that "every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in any foreign country, of an offense which, if committed within this State would," etc., "shall upon conviction of any subsequent offense committed within this State, be subject" to punishment in the same manner and to the same extent "as if the first conviction had taken place in a court of this State." Thus by implication is expressed the opinion of the legislature that the general words of the eighth section, *supra*, would not meet the case provided for in the tenth section. In Massachusetts, after a statute extending the prohibition against a second marriage under circumstances before stated to inhabitants of that State going out of it to evade the law, it was held that if in any event the foreign marriage could be invalidated, it could not be without proof of the intent made necessary by statute. Nor without it could there be a conviction for polygamy. (*Com.* v. *Lane,* 113 Mass. 458.) A similar distinction exists under the English law. In 1 Hale's P. C. 662, the case is stated of a woman who married in England and afterward married abroad during her husband's life. It was held she was not indictable under the statute of the former country for bigamy, for the offense was committed out of the kingdom, and the act did not in express terms extend its prohibition to subjects abroad. It is otherwise, however, in regard to certain offenses committed in other countries by Englishmen against their government, viz.: Murder and slave-trading, because the statutes have so provided. (*Warrender* v. *Warrender, supra.*) Now if the criminal court has no jurisdiction to punish the act when committed out of the State, how has the civil court jurisdiction to prohibit the doing of the act out of the State? The consequences are the same in either case, and are prescribed by the same statute. Whether a man is punished by fine and imprisonment, or by the disgrace of himself and the woman he married—the bastardy of his children—is a difference in degree only. The severer punishment is in the last alternative. Can the court imply the power to inflict it? Can it exist unless given by express language? I think not.

The statute does not in terms prohibit a second marriage in another State, and it should not be extended by construction. The mode of construction contended for by the respondent, if applied to the statutes of treason and dueling and the punishment of second offenses, would make useless those provisions which relate to the conduct of a citizen out of the State and the commission of crime in this State by one convicted in another State. Can they be disregarded, or the legislature charged with useless enactments? On the contrary, we must give weight and meaning to them; to their presence in those laws and their absence in the one of marriages. The difference is essential, and the varying language cannot be disregarded. There is first a prohibition broad as in the act before us, wide enough to take in all persons within the State, and prohibiting certain acts—a personal prohibition. Not content with that, the statutes go further and extend the same consequences to those acts when committed out of the State. These provisions are lacking in the law before us. When, therefore, we consider the legislation of this State before referred to, and the general rules regulating the territorial force of statutes, we cannot but regard the omission to provide by law for cases like the present as intentional, but if not, in the language of Lord ELLENBOROUGH, in *Rex* v. *Skone* (6 East, 518), "we can only say of the legislature *quod voluit non dixit.*" This view is sustained by the course of decision and legislation in Massachusetts. In *Medway* v. *Needham* (*supra*), the plaintiff sued for the support of certain paupers—one Coffee and his wife—alleged to have their legal settlement with the defendant. The only question on the trial, or the subsequent hearing before the whole court, respected the validity of his marriage. He was a mulatto and his supposed wife a white woman. They were inhabitants and residents of Massachusetts at the time of their marriage, and the statement is that "as the laws of the province at that time prohibited all such marriages, they went into the neighboring province of Rhode Island and were there married according to the laws of that province," and returned immediately to their home. Both courts held the marriage good. The statute regulating marriages in Massachusetts was at that time like our own, but the court placed their decision upon the general principle that a marriage good according to the laws of the country where it is entered into shall be valid in any other country, PARKER, Ch. J., saying: "This principle is considered so essential that even where it appears that the parties went into another State to evade the law of their own country, the marriage in the foreign State shall be valid in the country where the parties live;" and, referring to the statute which declares second marriages absolutely void, says: "They are only void if contracted within this State." *West Cambridge* v. *Lexington* (1 Pick. 506) involved the rights of infant children of Samuel Bemis, paupers, to public support in that State. The question turned upon the validity of his second marriage; the first had been dissolved for his adultery. Afterward and while his former wife was living, he married in New Hampshire, and the children were from that union. The court held that if the marriage had been contracted in Massachusetts, it would be unlawful and void, but that the laws of no country have force outside of its own jurisdiction, and therefore one, who by reason of his offense against it is disabled from contracting another marriage, may lawfully marry again in a State where no such disability is attached to the offense; and further, having a right to marry there, he could not while there violate the statutes of Massachusetts against polygamy. It was therefore held that the children were legitimate, their settlement to be where that of their father was, and the town entitled to recover for their support. The circumstances of *Putnam* v. *Putnam* (8 Pick. 433) are singularly like those before us; and it was held that although the second marriage was a clear case of evasion of the laws of the Commonwealth, it was valid upon the general rule referred to in the cases already cited. The court also say: "If it shall be found inconvenient or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another State, which if entered into here would be void, shall have no force within this Commonwealth." There is thus recognized a necessity discussed earlier in this opinion, for express legislation, if the citizen is to be held bound by the laws of his State for acts performed by him outside its limits. Legislation to this end was afterward had. (Rev. Stat. of Mass., ch. 75, § 6; Gen. Stat., ch. 106, § 6.) Referring to provisions of the act making void marriages between certain parties, or by persons in prescribed conditions or under certain circumstances, it declares, "where persons resident in this State, in order to evade the preceding provisions and with an intention of returning to reside in this state, go into another State or country and there have their marriage solemnized, and afterward return and reside here, the marriage shall be deemed void in this State." It is not necessary to consider the extent or scope of this statute. It has been discussed by the courts of that State, and is said by Dewey, J., in *Com.* v. *Hunt* (4 Cush. 49), "to have been intended to meet this class of cases, that is, of individuals fraudulently attempting to evade the law of Massachusetts, so far as respects persons divorced for the crime of adultery, and to declare such marriages by the guilty party to be void in this Commonwealth;" or as HUBBARD, J., says, in *Sutton* v. *Warren* (10 Metc. 453): "The only object of this provision is, as stated by the commissioners in their report, to enforce the observance of our own laws upon our own citizens, and not suffer them to violate regulations founded in a just regard to good morals and sound policy." We have no law in relation to this subject similar to that of Massachusetts or our statutes before cited in reference to dueling and treason. There is nothing in the statute to indicate an intention of the legislature to reach beyond the State to inflict a penalty. Nor can I discover an intent so to impress the citizen with the prohibition as to make an act, which is innocent and valid when performed, an offense when he returns to this State and himself a criminal for performing it. Every presumption is against such intention. The respondents rest their case upon the general words of the statute. These, taken in their natural and usual sense, would undoubtedly embrace the case of the appellant. "No second * * * marriage shall be contracted by any person during the life-time of any former wife of such person." "Every such marriage shall be absolutely void." "No defendant convicted of adultery shall marry again until the death of the complainant." Equally broad are the provisions of the criminal law declaring the punishment of the offender. They would comprehend every second marriage wherever celebrated, and take in the citizens of every State. It cannot be denied that they are subject to explanation and restraint. *Mosher* v. *The People* (*supra*), and the principle on which it rests, shows the criminal law to have no application to a marriage out of the State. The same rule was applied in *Sims* v. *Sims* (75 N. Y. 466), where, after a very full discussion of the question involved, it was decided that the provision of the Revised Statutes (2 R. S. 701, § 23), declaring a person sentenced upon a conviction for felony to be incompetent as a witness, does not apply to a conviction in another State; that it has reference only to a conviction in this State. The conviction was in Ohio;

it was assumed that the convict would have been incompetent as a witness in this State. Suppose a judgment here followed his evidence, and it was afterward prosecuted in Ohio. Would it be competent in defense to show that it was obtained upon evidence inadmissible by the laws of Ohio? Clearly not. And the reason is stated in the case cited: "The disqualification is in the nature of an additional penalty following and resulting from the conviction and cannot extend beyond the territorial limits of the State where the judgment was pronounced." He was, therefore, a competent witness in the State of New York. There is in principle a close analogy between the case I have supposed and the one before us. In each there is a personal disqualification. In one, to marry; in the other, to testify. In neither case does the disqualification arise from any law of nature or of nations, but simply from positive law. Each deprives the offender of a civil right. Now in case of the witness, his testimony in New York results in a judgment, a contract of record, to which, when it reaches Ohio, full effect must be given, and for its enforcement the machinery of the law of that State put in motion. In the other case—that in hand—a contract is entered into by the offender, which is a good contract under the laws of the State where made. If so, it should also follow that to each party thereto and to their issue every right and privilege growing out of the relation so established must attach. When, therefore, they return to this State with the evidence of that contract, can the courts do more than in the other case? Are they not limited to the inquiry whether the contract was valid in the State where made? And if it was, how can they deny to the child its inheritance? Let me go a little further. Suppose, on the day the decree of divorce was granted, Barker had also been convicted and sentenced for a felony. He would then have been subject not only to the statutes above cited, but to that other which declares "that no person sentenced upon a conviction for felony shall be competent to testify in any cause." (2 R. S. 701, § 23.) Disqualified therefore to marry or to testify, he does both in Connecticut, brings back to this State the judgment record and the marriage contract. If the first cannot be impeached because of his sentence, neither, as it seems to me, can the other, because of his "conviction." And for the same reason, viz.: that stated by Greenleaf as the result of the weight of modern opinion, sanctioned by this court in *Sims* v. *Sims* (*supra*), that personal disqualifications arising, not from the laws of nature, but from positive laws, especially such as are of a penal nature, are strictly territorial and cannot be enforced in any country other than that in which they originated. (1 Gr. Ev., § 376.)

Second: Nor are we, in the absence of express words to that effect, to infer that the legislature of this State intended its laws to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus,* and which is made binding by consent of all nations. It professedly and directly operates on all. To impugn it, is to impugn public policy. And while each country can regulate the status of its own citizens, until the will of the State finds clear and unmistakable expression that must be controlling. "Where," says MARSHALL, Ch. J. (*U. S.* v. *Fisher,* 2 Cranch, 389), "rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

Our conclusion is, that as the marriage in question was valid in Connecticut, the Appellant Rose Van Voorhis is a legitimate child of Barker, and as such entitled to share in the estate of the testator.

The judgment should be reversed and a new trial granted, without costs to the plaintiffs or Sarah A. Brintnall, but with costs to the apellant Rose Van Voorhis and the respondents Ella and Elias, to be paid out of the estate.

All concur, except FOLGER, Ch. J., not voting.

Judgment reversed.

PROPERTY RIGHTS UNDER MARRIAGE.

BESSE v. PELLOCHOUX, 73 ILL. 285, (1874).

APPEAL from the Circuit Court of LaSalle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Messrs. BICKFORD, BOWEN, &·MALONEY, for the appellant.

Messrs. BUSHNELL, BULL & GILMAN, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

In 1850, at the residence of the parties in Switzerland, appellant entered into an ante-nuptial agreement with Marie Elizabeth Pellochoux, whom he afterwards married. It was executed and attested with all the usual formalities, and was doubtless valid by the laws of the canton where it was made.

The three principal paragraphs are as follows:

"1st. The future husband associates and renders his future wife partaker of half the property acquired during their marriage.

"2d. The furniture of the contracting parties once inherited and inventoried, will be confounded and divisible into two equal parts, between the conjoints.

"3d. Joseph Nicolas Besse, as well for his wife, Marie Madeline Metroz, as himself, both present, and natives of Orsieres, where they now live, desiring to prove to the young couple their approval of re-union to be contracted, give to their son, Joseph Nicolas, half of their immovable as well as movable property, on the close conditions that the conjoints will work the other half still retained and belonging to said parents. The parents of the groom now forsake all claim to what they will acquire from this day in favor of the conjoints—the whole being gratefully accepted by the receivers.

"The parties, bringing a modification to clause No. 2, have agreed that the furniture inherited or now inherited will be divided the couple, without any regard to their production, from the time of their marriage.

"The bride's parents, both present, take upon themselves the obligation to leave their daughter Marie a share of their succession, equal to a share of each of the children of the same bed."

Other relatives were present, who made gifts to the bride and groom, but the givers reserved the possession during their lifetime.

Within a few years after their marriage, appellant and his wife came to this State. On their arrival in this country they had no considerable property or money. The real estate in controversy was all acquired after the change of domicil, by their united industry, the title to which was taken in the name of appellant. In 1869 Marie Elizabeth died, never having had any children. Appellees are her heirs at law, being her brothers and sister. Under the provisions of the ante-nuptial contract, they claim they are entitled to one-half of all the property, both real and personal, acquired by appellant previous to the death of his wife.

The original contract is written in the French language, and if the translation found in the record is correct, it must be conceded there is much obscurity in its provisions. Appellees having presented it, the translation must be taken as correct for the purposes of this decision.

The words that are supposed to create an estate in the wife equal to one-half of all the property acquired during marriage, are of doubtful meaning. They have no definite signification, like well understood legal terms. The language is, he "associates and renders his future wife partaker of one-half the property acquired during marriage." How is she rendered "partaker?" Is she given the use of the property during the marriage relation, or is she to be invested with the title of an undivided half as of an absolute ownership? No words are used which, in their ordinary or legal import, define what estate she takes, and none are used that convey the idea the estate, whatever it is, shall descend to her heirs. If we concede the view of the law contended for, that the ante-nuptial contract is operative and binding as to property acquired after the change of the matrimonial domicil, the decision could be rested on the construction, it was only intended to make the wife "partaker" in the use of one-half of the property acquired during marriage, and that no intention was manifested to invest her with an estate of inheritance, in case she should die before her husband, that would descend to her heirs. This view is strengthened by reference to the 3d clause, where the parents of the groom give to their son, not to the future wife, one-half of their immovable and movable property, "on the close conditions the conjoints will work the other half still retained and belonging to said parents."

It could not have been the intention to continue a community of interest between their son and the heirs of the future wife, in case she should die first. The construction insisted upon would produce this result, however irrational it may appear to be. But, independently of this construction of the contract, the law itself would not continue a community of interest between the husband and the heirs of his wife. In *Murphy's Heirs* v. *Murphy,* 5 Martin, 83, it was decided, when persons intermarried in a country where the local laws create a community of goods, and remove to a country where that principle does not prevail, the community will not continue between the husband and their children after the death of the wife.

It will be observed, the parents of the bride take upon themselves the obligation to leave to their daughter Marie a share of their succession, equal to a share of their other children. This would clearly be the separate estate of the wife. Thus it will be seen, when all the provisions of the instrument are read together, it was the intention the husband and wife should each have separate property. It was so expressly stated in the contract, and what the husband rendered the wife "partaker" of, must have been the use of the property during the marriage relation, and not the absolute ownership of any distinct portion.

But, regarding the other construction as the true one, that the words "render her partaker," give the wife an undivided interest in all the property that should be acquired during marriage, still we do not see upon what principle the position assumed by counsel can be maintained.

The contract associating the parties thereto as joint partakers in the property to be acquired during marriage, does not specify any place where it is to be performed. But we are not left in doubt on this point. An examination of its provisions shows it could not be fully performed at any place other than the place where it was entered into, viz.: at the place of the matrimonial domicil. This is apparent from the provisions of the third paragraph.

But the property which is the subject of this litigation, was all acquired after the husband and wife had changed their domicil, and taken up their permanent abode in a country foreign to the matrimonial domicil. The question that presents itself is, whether the after acquired property will be affected by the provisions of the ante-nuptial contract, or whether the law of the actual domicil in a foreign country will govern as to all future acquisitions.

What effect is to be given to ante-nuptial agreements, where parties have changed their domicil and made new acquisitions, has been the subject of much discussion. There is great confusion and contradictory statements in the opinions of jurists, in all countries, on this question.

The general doctrine is, no doubt, as stated by the text writers: Where there is an express ante-nuptial contract, it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicil but in every other place, unless it contravenes some law or principle of public policy of the country where it is sought to be enforced. Story Con. Laws, sec. 143; Wharton Con. Laws, sec. 197.

But, Mr. Justice Story adds: "Where there is no express nuptial contract at all, or none speaking to the very point, the question what rule ought to govern is surrounded with more difficulty." The author then enters upon an elaborate review of the whole subject, and among others reaches these conclusions:

"1st. Where there is a marriage between parties in a foreign country, and an express contract concerning their rights and property, present and future, that, as a matter of contract, will be held equally valid everywhere, unless, under the circumstances, it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere, but as to immovable property in a foreign country, it will, at most, only confer a right of action, to be enforced, according to the jurisprudence *rei sitae*.

"2d. Where such an express contract applies, in terms or intent only, to present property, and there is a change of domicil, the law of actual domicil will govern the rights of the parties as to all future acquisition." Story Con. Laws, secs. 184 and 185.

The doctrine of the text has, for its support, the best considered cases on this subject, so far as we have examined them. In Louisiana, cases involving these principles have been the most elaborately discussed of any arising in this country. The jurisprudence of that State is founded on the principles of the French and Spanish laws, which create a community of interest between husband and wife as to all acquests and gains, and the frequent removals from and into States where that principle does not prevail, has produced litigation involving the principles we are considering. The decisions of the courts of that State evince great learning and research.

As was said in *Gale* v. *Davis' Heirs,* 4 Martin: "Though it was once a question, it seems now to be settled, that where a couple emigrate from the country where their marriage was contracted, into another, the laws of which are different, the property which they acquire in the place where they have moved is governed by the laws of that place."

This principle was again recognized in *Murphy's Heirs* v. *Murphy, supra.* This latter case is an authority for the first proposition cited from Judge Story's work. The second proposition rests upon the principle of *Gale* v. *Davis' Heirs, supra,* and *Saul* v. *His Creditors,* 5 Martin, (N. S.) 569.

The latter proposition might be somewhat more comprehensively stated. Not only where there is no contract speaking directly to the point, but where it clearly appears it was to apply to personal property only, or to be performed only in the country where made, and there has been a change of the matrimonial domicil, the law of the actual domicil will control as to all property thereafter acquired. Thus, in *Fuss* v. *Fuss et al.* 26 Wis. 256, where there was a post-nuptial contract as to property between persons married and domiciled in Prussia, who then owned no property elsewhere, and it did not appear they contemplated a change of domicil, nor that there was any intention manifested to have it control property that might be acquired in any foreign country, it was decided the after acquired property, held in the name of the husband, was not affected by the contract, and was subject to be disposed of by him, by will or otherwise, according to the laws of the actual domicil.

The case of *Castro* v. *Illies,* 22 Tex. 479, is a well considered case, and announces a doctrine which has its foundation in reason as well as in natural justice, viz: Where there has been a change of domicil, though there be an express contract, if it do not expressly provide, or the intention be not manifest, it is to apply to and govern all after acquired property, wherever the parties may reside, it will not affect real property situated in a new domicil. The reasoning in *Saul* v. *His Creditors, supra,* is cited in support of this view of the law, to which may be added *LeBreton* v. *Myers,* 8 Paige, 261; *Kneeland* v. *Ensley,* Meigs' R. 620; *Gale* v. *Davis' Heirs, supra; Lyon* v. *Knott,* 26 Miss. 548.

In the case at bar there is nothing in the contract, "speaking to the very point," that manifests any intention that all future acquisitions of property in foreign countries should be controlled by it. It will bear no such construction. As before said, it appears, on the face of the agreement, it was to be and could not be fully performed elsewhere than in the canton where the parties resided, in Switzerland. When it was entered into it could not have been the intention to change their domicil, and it certainly never entered the minds of the parties it should affect the property that might thereafter be acquired in foreign countries.

The position of counsel is not strengthened by the allegation in the bill, that, by the force and effect of the contract, as construed by the laws of the canton where the contracting parties resided, Marie Elizabeth would be entitled to the undivided one-half of all the property wihch the husband then owned or should thereafter acquire during the marriage. It may be this would be the true construction had they remained in Switzerland, but, assuming the parties contracted with reference to the laws of their domicil, and that such laws entered into and formed a part of the contract itself, still, they could have no extra-territorial effect. Notwithstanding the local laws may form a part of the contract, the extent of those laws is limited to the dominion of the sovereign power that enacts it. It is not by virtue of the laws of a foreign State, but by comity that exists between nations, that an antenuptial contract, executed there, is allowed to control as to the acquisition of property over our customs and positive laws. No contract, either express or implied, can give to the local laws a more extended force than they really had. In all marriages, the parties may be presumed to tacitly adopt the laws of their domicil, and to agree to be governed by them, but the obligation will be limited by the extent of those laws. Construing this contract as though the local laws of the canton constitute a part of it, it will not be any more obligatory for that reason in another jurisdiction. Outside the territorial force of local laws, such implied or tacit contract would cease to control the acquisition of property in another country to which they might remove. The laws of the matrimonial domicil do not travel with the parties, and no contract can give them vitality or effective force here. No State is bound to admit the force of a foreign law as controlling within its jurisdiction. By comity we permit express contracts to have the same force and effect as in the countries where made, but not their local laws. *LeBreton* v. *Bouchet,* 3 Martin, 60.

We are of opinion our laws must govern as to property acquired by appellant and his wife during their residence in this State. There is no express contract to the contrary. The contract was manifestly to be performed in the canton where the parties were domiciled when they entered into it. It is local in its effect and operation, and it could not have been the intention it should control the acquisition of property at any other place than the matrimonial domicil. Appellant, having changed his domicil by the consent of his wife, as we must presume, the applicatory law also changes. In the absence of any express contract to the contrary, the law of the domicil of the husband governs as to the acquisition of property.

The decree will be reversed and the bill dismissed.

.. *Decree reversed.*

FOREIGN DIVORCE.

DITSON v. DITSON, 4 R. I. 87, (1856).

PETITION FOR DIVORCE. The petition represented the petitioner as of Little Compton, in the state of Rhode Island, and that she had resided within the state for the last three years; that she was married to George L. Ditson in the city of New York, in October, 1842; that she has at all times faithfully performed her duties as a wife, but that her said husband has treated her with extreme cruelty; has neglected and refused, being of sufficient ability, to provide necessaries for the subsistence, and has wilfully deserted her for the last three years, and been guilty of other gross misbehavior and wickedness repugnant to, and in violation of, the marriage covenant; that her said husband is not within this state, nor within fifty miles of Newport. Prayer, for a decree of divorce from the bond of matrimony between the petitioner and her husband, and that the name of the petitioner be changed from her name of Mary Ann Ditson, to her maiden name of Mary Ann Simmons, and for further relief.

Accompanying the petition was an affidavit of the petitioner, stating that her husband was not a resident of this state, and was in parts unknown to the petitioner. The petition was filed in the clerk's office of the supreme court for the county of Newport, on the 9th day of July, 1856; and the clerk certified that he had given six weeks' notice of the application by publishing it in the Newport Mercury for that period next before the sitting of the court at the present August term.

It appeared that the petitioner, then Mary Ann Simmons, was married, without the knowledge or consent of her father, whilst a girl at school in New York, to George L. Ditson, an Englishman, to whom she had been introduced outside the school, the ceremony being performed by Dr. Spring on the 13th of November, 1842; that after marriage, Mr. and Mrs. Ditson went to Europe, and from thence to Cuba, where they resided for several years; that shortly after their return, Ditson went to Europe by himself, leaving his wife, then in a feeble and emaciated condition, without any provision, to be supported by her father, and was gone about two years; that he returned, however, and lived with her again for a short period, treating her morosely and unkindly; but there was no proof of extreme cruelty, though he locked her up once in her chamber for making a purchase that displeased him, and treated her with neglect and spoke of her in a careless and indifferent manner. The last time he left her was in Boston, whence he went to Europe, saying just before he went, to a witness, "that he meant to go away, and did not care a damn for Boston or any body in it." Upon being thus deserted, the petitioner came to live with her father at Little Compton, R. I., of which place he was a native, and then a domiciled inhabitant. Ditson had been absent, at the time of filing the petition, for upwards of three years, during which time he had not once communicated by letter or message with his wife, or left, or made, any provision for her support, though of sufficient ability so to do. From the time of his desertion, the petitioner had lived with her father in Little Compton, except about three months of the time, which she had passed in Newport, R. I. During this time she had been wholly supported by her father, except, in what manner did not appear, the little that she had been able, by her own exertions, to do for herself. It was admitted that Ditson had never been domiciled in Rhode Island, or even, to the knowledge of any witness, been within the state. It was not known that he had any domicil in the country; he having resided since the marriage, either in Europe or Cuba, and having remained but a short time either in Boston or New York. No personal notice of the application for divorce had been given to him, and none attempted to be given; since, from his silence, the place where he resided or temporarily dwelt, was wholly unknown to the petitioner or to her friends.

Under these circumstances, the chief justice intimating a doubt concerning the jurisdiction of the court over the cause, desired the counsel for the petitioners to search authorities and present them to the court upon that subject; the court being satisfied that the petitioner had proved by the desertion of her husband without cause, and by his neglect to provide for her support, being of sufficient ability so to do, a case for divorce *a vinculo* under the statute, provided the court had, under the circumstances proved, power and jurisdiction to grant her petition.

Francis E. Hoppin, for the petitioner, took the following points:—

First, that the petitioner is an actual *bona fide* resident of Rhode Island, and had actually resided therein for upwards of three years before filing her petition; (Dig. 1844, pp. 264, 265,) coming to this state under circumstances which enabled her to gain a domicil here distinct from and independent of that of her husband. *Harteau* v. *Harteau,* 14 Pick. 181.

Second. That the petitioner being a domiciled inhabitant of this state, was entitled, in her desertion, to the protection and relief of its laws. *Harding* v. *Alden,* 9 Greenleaf, R. 140. *Tolen* v. *Tolen,* 2 Blackf. 407. There having been no change of residence by the petitioner for the purpose of evading the laws of any other state, the law of the place of actual residence of the petitioner must govern the dissolution of her marriage, irrspective of the place of its celebration. *Jackson* v. *Jackson,* 1 Johns. R. 434. *Broden* v. *Fitch,* 15 Johns. R. 120. *Bradshaw* v. *Heath,* 14 Wend. 407. Story's Confl. Laws, § 230, ed. 1836. *Clark* v. *Clark,* 8 Cushing, 385. *Barber* v. *Root,* 10 Mass. 260.*Harding* v. *Alden,* 9 Greenl. R. 140. *Tolen* v. *Tolen,* 2 Blackf. 140.

Third. To deny the petitioner relief under the circumstances of the case, upon the ground of want of jurisdiction over her husband, because he had not been served with personal notice, would enable a husband, especially a foreigner, as in this case, by deserting his wife, to deprive her of all the redress which the laws of this state provide for her as one of its citizens.

Fourth. To entitle the court to jurisdiction over the dissolution of the marriage of one of its citizens, it is sufficient if the court have jurisdiction over the petitioner, and personal service upon the other party to the marriage need not be, if it cannot be, made. Bishop on Marriage and Divorce, §§ 728, 730, 731, 732, 735, 739.

Ames, C. J. The "Act regulating marriage and divorce" in this state, requires, in words, no other jurisdiction in this court over the parties to a petition for divorce, than that the petitioner should have *resided* in the state for *three years* next before the preferring of the petition; with a discretionary power in the court to dispense with *that particular term,* as it has been construed, of *residence* or *domicil.* Dig. 1844, p. 265, § 11. Public Laws since Dig. 1844, p. 670. This dispensing power has, however, been very sparingly exercised by the court, and never, unless indeed the court may have been misled by false testimony, except in cases where a long previous residence, and especially by natives of the state, had been interrupted but a short time within the three years preceding the petition, or, in which some peculiar circumstances loudly invoked the aid of the court, such as an open adulterous marriage by the wife, the petitioning husband having resided in the state for a long portion of the three years, and the court being satisfied that he came to the state, not for the purpose of divorce, but *bona fide* to *reside* here, as a *domiciled* or *settled inhabitant.* Of late years, it has never been dispensed with where the alleged cause of divorce, occurring in another state, was not a cause for the species of divorce asked, in *that* state. There is nothing, however, in the statute, as we regard it, which *obliges* the court to take jurisdiction of such a petition merely because one of the parties only, the petitioner, is a resident of the state, though he or she may have been such for the period of three years next preceding the petition; although, it must be admitted, that the practice under the statute has proceeded upon that supposition. By the 10th section of the act of this state "regulating marriage and divorce," this court is authorized "by rule or otherwise to prescribe the notice to be given on petitions for divorce, alimony, separate maintenance, and custody of children, and may issue such process as may be necessary to carry into effect the powers conferred on them by this act." Dig. 1844, pp. 264, 265. By the 14th rule of the court, made by the authority of this act, "On all petitions for divorce, the adverse party, *if resident within this state,* or within fifty miles of the place of trial, shall be notified and served with a copy of such petition, three weeks at least before the sitting of the court; and if resident without the state, and more than fifty miles from the place of trial, notice shall be given in some one of the public newspapers, printed in Newport or Providence, six weeks before the sitting of the court; and such petitions as contain an allegation that the adverse party is not resident in this state, or within fifty miles of the place of trial, shall be accompanied with an affidavit of the petitioner, stating his or her knowledge and belief of the place of residence of such adverse party." Rules of Sup. Ct. of R. I. prefixed to Vol. I. R. I. Reports, pp. xii and xiii. Under this rule, this court has acted in giving constructive notice to non-resident defendants to petitions for divorce, in cases where relief of this kind has been asked by resident citizens, and has, upon proper proof, afforded that relief, even though the defendants have never resided within this state or subjected themselves in any way to its jurisdiction. If, however, it appeared from the affidavit of the petitioner or otherwise, in the course of the hearing, that the petitioner knew of the place of residence of the other party, and that place was within the United States, the practice has for many years been to continue the petition, and order personal notice of the pendency thereof to be given to such party through the mail. In the case at bar, under this rule, upon affidavit of the petitioner that according to her best knowledge and belief, the defendant, her husband, doth not reside in this state, or within fifty miles of the town of Newport, but is in parts unknown, he being a foreigner, the notice prescribed by the rule has been given, by publication of the same, for the space of six weeks before the sitting of the court, in the Newport Mercury, a paper printed in the city of Newport. If, however, by the general law pertaining to this subject, a decree of divorce *a vinculo*, made here, be void elsewhere, unless both parties to the marriage are resident in this state at the time of the application, or the respondent has been served with notice in the state, or being served without notice out of it, has appeared and submitted himself to our jurisdiction, so far from feeling compelled by the language of our statute, as it stands at present, to pass such decrees, we should feel compelled to refuse to pass them, lest they should bring upon the resident petitioner, in such cases, greater evils than those that our statute was designed to remedy.

When, therefore, this question presented itself to the court for the first time since I had the honor of presiding over it, in the case at bar, my brethren on the bench, though less doubtful with regard to our jurisdiction in such a case than myself, consented, at my request, to reserve the question for mature consideration and deliberate decision, in order that the course now adopted might for the future guide ourselves as well as those subject to our jurisdiction. Every case, during our recent circuit, in which it has since arisen, has also been reserved; and the question having been argued before us by the counsel in this case, was already under consideration, when our attention was attracted by a remark of the learned chief justice of Massachusetts, in delivering the judgment of his court in the recently reported case of *Lyon* v. *Lyon,* 2 Gray, 367, decided in 1854, that this court, in its decree of divorce, reviewed and considered in that case, had violated, upon this subject, principles of *general* law. Such a remark, coming from a quarter entitled to so much respect, has only induced us more carefully to scrutinize by the light of the *general* law the true grounds of jurisdiction in such cases; so that however, in *ex parte* hearings of them, we may be occasionally misled as to *facts*, it may not be supposed that we are careless of, or would deliberately violate in this respect settled principles of law.

In the case of *Lyon* v. *Lyon, supra,* which was an application for divorce on the part of a husband residing in Massachusetts, a former decree of this court divorcing the same parties *a vinculo* on the application of the wife, was declared void; partly on the ground, that it was obtained here by a domiciled inhabitant of Massachusetts in fraud of a statute of that state, which avoids divorces obtained out of the state for causes occurring in it, or for any cause which would not authorize a divorce by its laws, when obtained by a citizen of Massachusetts who goes "into any other state or country *in order* to obtain the divorce." We have no remark, except of approval, to make of the statute of Massachusetts, or of this decision under it, upon the facts made to appear *ex parte* to *that* court, probably quite different from the facts made to appear in the same matter before, *ex parte,* to *this.*

It is a well-settled principle of *general* law upon this subject, that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an *actual bona fide* domicil within its territory; and this holds, whether one or both the parties be *temporarily* residing within reach of the process of the court, or whether the defendant appears or not, and submits to the suit. This necessarily results from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects, without interference by foreign tribunals in a matter with which they have no concern. Bishop on Marriage and Divorce, § 721, p. 721, 2d ed. and cases cited. We entirely agree with the judgment given by the supreme court of Massachusetts on this point, in the well-considered case of *Hanover* v. *Turner,* 14 Mass. 227, 231; in which both this rule, and the reason for it are stated with that precision and largeness of view, which indicate that the court fully comprehended the question before them as a question of general law; a kind of praise which cannot, with any justice, be bestowed upon many American cases upon this important and interesting subject.

Our attention has been attracted to the case of *Lyon* v. *Lyon,* because, in it, the decree of this court divorcing Mrs. Lyon is arraigned, and declared void, upon general principles of law apart from the statute, that is, as we understand it, apart from the principle of general law embodied in it. The learned court are made to say, that "upon general principles of justice and policy," the decree in question would, "before the revised statutes," have been held void, "partly on the ground that it was a proceeding in fraud of our law," to which we agree upon the facts proved to the court, "and partly because the court of the foreign state (Rhode Island) could have no jurisdiction of the *subject-matter* and of *both* the parties." 2 Gray, 368, 369. And again, at the conclusion of the opinion, the court recur to the same matter: "But if not within the statute, *for the reasons before given*, we are of opinion that the decree in question is void, upon general principles of law." Ib. 370. By this we understand that the learned court must have intended,—*First,* that by the general law applicable to the subject of divorce, the supreme court of Rhode Island had no jurisdiction of *the subject matter* either because *the marriage* took place, or because *the alleged cause of divorce* occurred out of its jurisdiction; and *second,* because the court had not jurisdiction of *both* parties, the husband not being domiciled in Rhode Island, and no effectual service upon him *within the state* having been obtained, and he, by appearance, not having submitted his cause to the jurisdiction of the court.

With regard to the alleged want of jurisdiction over "*the subject-matter,*" which includes, as distinct from jurisdiction over the parties, only the marriage and cause of divorce, we think that there must be some inaccuracy in the language of the report. We think so, because, as said by Jurge Story, "The doctrine now *firmly* established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicil of the parties gives jurisdiction to the proper courts, to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or to the place where the offence for which the divorce is allowed was committed." Story's Conflict of Laws, § 230 *a;* and Bishop on Marriage and Divorce, § 720, and note 2, where see a very instructive note, containing all the authorties, domestic and foreign. See also Ib. §§ 740, 741, &c. We think so, more especially, because, as we understand the scope of his reasoning, no one has vindicated this doctrine of American law with more ability than the present learned chief justice of Massachusetts, in delivering the judgment of his court in the case of *Harteau* v. *Harteau,* 14 Pick. 181, 185, 186. We regard, therefore, the alleged want of jurisdiction in Mrs. Lyon's case, on the ground of want of jurisdiction over *the subject-matter* as something distinct from want of jurisdiction over *both parties,* as a mere inaccuracy of statement; the court intending, perhaps, that, not having jurisdiction over both parties, the supreme court of Rhode Island had neither jurisdiction over the *marriage* nor the *delictum,*—that is, over the *subject-matter.* It is true that in *Barber* v. *Root,* 10 Mass. 265, 266, a case referred to by the learned court in *Lyon* v. *Lyon* for the grounds of their judgment, stress seems to be laid upon the place of contract and of the place of the violation of it, as affording or not affording ground for jurisdiction, as the case might be, over the *subject-matter;* partly upon the idea of the subsistence or non-subsistence of the contract within the territory of the court taking jurisdiction, and partly, so far as the *delictum* was concerned, upon some notion of police. We understand, however, the supreme court of Massachusetts to have rejected both these false and confused notions; and in *Hanover* v. *Turner,* 14 Mass. 230, 231; *Harteau* v. *Harteau,* 14 Pick. 182-187 incl., and therefore in *Lyon* v. *Lyon,* 2 Gray, 368-370, to be understood as regarding marriage not as an executory contract between the parties to it, but as an universally recognized relation between them, deeply affecting their *status,* or legal and social condition, and for that reason, properly dissoluble according to the law of the country in which they are domiciled, without reference to the law of the place of the original contract of marriage, out of which the relation has emerged. We also understand the result of these decisions to be, that a breach of the duties of this relation, though sometimes a crime, and when such, punishable in that character only in the place where it is committed, yet, considered as a cause of divorce, to have no locality; and, therefore, to be regarded as a cause of divorce, wherever occurring or committed, equally as if it had occurred or been committed within the territory of the state having jurisdiction over *the parties,* in the sense of *both* parties to the relation.

We may remark in passing, although we do not mean to launch into the sea of conflict on this subject between the laws of England and Scotland, that whilst it is the doctrine of both the Scotch and English courts, as well as of our own, that the place where the offence is committed, whether in the country where the suit was brought, or a foreign country, is immaterial to jurisdiction in divorce, it is the equally well-settled doctrine of the Scotch courts that the *place of marriage* is also immaterial; and this doctrine, as a doctrine of Scotch law, has recently received the approbation of the house of lords, sitting upon a Scotch appeal, if some doubt be not also thrown by the decision upon the peculiar doctrine of the English law, as held in *McArthy* v. *McArthy,* and *supposed to be held in Lolley's Case,* that an *English* marriage cannot be dissolved by a foreign tribunal. *Geils* v *Dickenson,* 20 Eng. L. & Eq. R. 1, 10, 11, opinion of Lord St. Leonards; and see Bishop on Marriage and Divorce, §§ 745-761 incl., and cases cited.

The other principle of general law mentioned in the decision of *Lyon* v. *Lyon, sup.,* as violated by this court in divorcing Mrs. Lyon, to wit, that the court had not jurisdiction over *both* parties to the marriage, presents a more difficult question, and one which, as we have said, had attracted our attention previous to our knowledge of the above decision and opinion of the supreme court of Massachusetts.

The question raised by the case at bar, and for the decision of which in the affirmative this court is said by the supreme court of Massachusetts in *Lyon* v. *Lyon* to have pronounced a decree in favor of Mrs. Lyon void upon general principles of law, is, whether the *bona fide* domiciliation of the *petitioning* party in this state is sufficient to give this court jurisdiction to grant a divorce *a vinculo,* although the other party to the marriage to be dissolved has never been subject to our jurisdiction, never been personally served with notice of the petition within the state, or appeared and answered to the petition, upon constructive notice, or upon being served with personal notice of it, out of the state? In other words, the question is, whether, as a matter of general law, a valid decree of divorce *a vinculo* can be passed in favor of a domiciled citizen of the state, upon mere constructive notice to the foreign or non-resident party to the marriage, against whom, or to dissolve whose marital rights over or upon the petitioner, the aid of the court is invoked?

Such a question, as said by a late excellent writer upon this subject, can never arise in England, where this whole matter, so far as it is a matter of *judicial* determination, is committed to the ecclesiastical courts. Those courts have no power to dissolve marriages, good *ab initio,* for supervenient causes, and can only act for such causes upon suits for divorce a *mensa et thoro* and for restoration to marital rights; their jurisdiction in *jactitation* suits, being confined to the ascertainment of whether a marriage reputed or boasted of ever existed, and in *nullity* suits, to the declaring marriages void, or avoiding them from the time of the decree, which, from causes pre-existing the ceremony of marriage, were, by law, either void or voidable *ab initio*. The common law of their jurisdiction, as shown by the 106th canon of 1603, and afterwards enacted by statute, was, that no person could be cited out of his diocese; the court interfering in such matters, it is said, for the good of souls merely, and its jurisdiction being confined, with that of the bishop or ecclesiastical dignitary represented by it, to the care of the souls of those domiciled, or at least present within the diocese. It is also held that the canon does not apply to persons having no fixed residence in the kingdom, but only to persons cited who are inhabitants and dwellers in some *diocese* or *district* placed by law under some particular ecclesiastical jurisdiction, and that the statute does not extend to Ireland. Bishop on Marriage and Divorce, § 733, and p. 734, n. 2, 2d ed. 1 Blacks. Com. 441, 442 and notes. 3 Ib. 92-95 and notes. 4 Ib. 275, 276, *vide passim*, N. Y. Ed. 1827. It is evident that the peculiar jurisdiction of these courts does not depend upon the *domicil* of the libellant, who, though a foreign or Scotch resident, may follow his wife, or she her husband, into the proper ecclesiastical tribunal of England for the appropriate relief to the case which it is empowered to give. The court must, however, have jurisdiction over the *defendant*, or its decree, from its nature, could have no personal effect upon him or her; but except the defendant *be domiciled* in some particular *diocese* or *district* it is apprehended that a *temporary* residence of the defendant in such district or diocese, is sufficient to give the court jurisdiction. In *Geils* v. *Dickenson*, 20 Eng. L. & Eq. R. 1, 9, 10, 13, 14, the marriage having taken place in England, between a Scotchman and an Englishwoman, the parties were domiciled in Scotland, paying only occasional visits to England. They resided in Scotland until September, 1845, when the wife left her husband, and returned to her mother's house in England. In October, 1845, the husband instituted in the arches court of Canterbury a suit for restitution to conjugal rights, to which the wife gave in a "responsive allegation," in which she stated various acts of cruelty and adultery committed by her husband in Scotland,

and became an actor in the cause as well as a defendant, by praying that she might "be separated from bed, board, and mutual cohabitation" with her husband, by reason of his adultery, and cruel and unnatural practices upon the person of the proponent. The arches court entertained both the original suit and the new action raised by way of defence in it, and finding the alleged adultery of the husband proved, divorced the wife, as she desired, from bed, board, and cohabitation with her husband, until they might be reconciled to each other, inhibiting both from contracting another marriage during the lifetime of the other. The ecclesiastical court in this case took jurisdiction at the suit of a plaintiff domiciled in Scotland pursuing his wife thence to England for its relief against *her,* freshly returned to its jurisdictional district, and again upon her "responsive allegation," both as a *defendant* and *actor* in the cause, granted her a divorce. The wife subsequently raised an action for divorce *a vinculo* in Scotland, for the same acts of adultery by virtue of which she defended herself and obtained the divorce *a mensa et thoro* in England, which was granted by the court of session, and afterwards confirmed, on appeal, by the house of lords; and although the only question, both below and above, turned upon the effect of the decree of the court of arches—that is, whether it estopped her from further relief, or was legally consistent with it,—neither court nor counsel intimated a doubt as to the jurisdiction of the court rendering the decree. It is evident, that from the peculiar principles which regulate the jurisdiction and action of the English ecclesiastical courts, in matters of divorce, very little light can be gathered to aid us in our investigation.

As a matter of general law, this must be sought in the legal nature of marriage, and what it consequently is, upon which a decree of divorce operates, and in the jurisdiction of a state over its own citizens and subjects, as well as in the decisions of courts bearing directly upon this point, or elucidating the principles which govern its decision. It is undoubtedly true, as a common-law principle, applicable to the judgments of its courts, that they bind only *parties* to them, or persons in such relation to the parties and to the subject of the judgment, as to be deemed privies to it.

The rule of this system of jurisprudence, which brings privies within the operation of the notice served upon the principals to a judgment and binds them by its effects, is founded upon quite as clear a policy, and is sanctioned by quite as complete justice, as that which renders the judgment obligatory upon those whom they represent. It is founded upon the great policy *ut sit finis litium,* and upon *the necessity,* to carry out this policy, that the future and contingent representatives of the parties in relation to the subject of the judgment should be bound by it. Again, there is no system of jurisprudence, which, founded as the jurisdiction of the court is upon the personal service of the subpœna, is more special in its requisition that all parties interested should be served in the suit, in order to be bound by the decree, than *that* administered by the English chancery; yet even in this court, from the same policy, and upon the same necessity, the *first* tenant in tail, or the first person entitled to the inheritance, if there be no tenant in tail living, or even the tenant for life, as the only representative to be found of the whole inheritance, by his appearance to the suit binds to the decree in it all those subsequently and contingently interested in the estate; the court, in administering this rule of representation of parties, taking care only that the representative be one whose interest in the subject of the suit is such as to insure his giving a fair trial to the question in contestation, the decision of which is to affect those who remotely or contingently take after him. Again, there is the large class of proceedings *in rem,* or *quasi in rem,* known especially to courts administering public or general law, and borrowed from thence into every system of jurisprudence, in which, the jurisdiction being founded upon the possession of the thing, the decree binds all interested in it, whether within or without the jurisdiction of the nation setting up the court, and whether personally or constructively notified of the institution or currency of the proceeding. This, too, is founded upon a necessity or high expediency, since, without it, a prize or instance court, for example, could not, so scattered or concealed are the parties interested, perform any of the functions for which, by the general or public law, it is set up. Proceedings of this nature must, we think, be familiar to the courts of Massachusetts; and probably not a day passes in which things within their jurisdiction are not, by direct attachment or garnishee process, seized, attached, condemned, and sold under their judgments, without other than constructive notice to the non-resident owners of them, in order that these courts may do justice to their own citizens, or even to alien friends, properly applying to them for relief. Here, too, necessity requires the courts to dispense with personal notice, in order to give effect to their judicial orders; since otherwise, the state might be full of the property of non-residents and aliens, applicable to all purposes except the commanding ones of justice. Without doubt, in these and other like cases, the general law in dispensing with *personal* notice from necessity, requires some fair approximation to it, by representation, substitution, or at least such publicity, as under the circumstances, is proper and possible, or the proceeding will be regarded as a fraud upon the rights of the absent and unprotected,—a robbery under the forms of law, and so a fraud upon law itself. It is, however, a very narrow view of *the general law*, it is to form a very low estimate of the wisdom which directs its administration, to suppose, that when it can do justice to those *within* its jurisdiction and entitled to its aid only by dispensing with personal notice to those *out* of it, and substituting instead what is possible for notice to them, it is powerless to do this, and so, powerless to help its own citizens or strangers within its gates, however strong may be their claims or their necessities. Such a sacrifice of substance to shadows, of the purposes to the forms of justice, might mark the ordinances of a petty municipality, but could hardly be supposed to characterize the system of *general* law.

Now, *marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic *relations*. In strictness though formed by contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than "fatherhood" or "sonship" is a contract. It is no more a contract than serfdom, slavery, or apprenticeship are contracts, the latter of which it resembles in this, that it is formed *by* contract. To this relation there are two parties, as to the others, two or more, interested without doubt in the existence of the relation, and so interested in its dissolution. These parties are placed by the relation in a certain relative state or condition, under the law, as are parents and children, masters and servants; and as every nation and state has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory. It may, except so far as checked by constitution, or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate *them,* and so the *legal* obligation of the relation which involves them, altogether. This it may do, with the exception above stated, as to some relations, by *law*, when it wills; declaring that the legal relation, of master and slave, for instance, shall cease to exist within its jurisdiction, or for what causes or breaches of duty in the relation, this, or the legal relation of husband and wife, or of parent and child, may be restricted in their rights and duties or altogether dissolved through the judicial intervention of its courts. The right to govern and control persons and things within the state, supposes the right, in a just and proper manner, to fix or alter the *status* of the one, and to regulate and control the disposition of the other; nor, is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the state diminished by the fact that there are other parties interested through some relation, in the *status* of these persons, or by some claim or right, in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife? The slave who flees from Virginia to Canada—no treaty obliging his restoration—or who is brought by his master thence to a free state of the Union—no constitutional provision enforcing his return—finds his *status* before the law in the new jurisdiction he has entered, changed at once; and no one dreams that this result of a new domicil and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and, as a relation, is nowhere so restrictive and so binding in its obligations as amongst the most truly civilized portions of it. Yet each nation and state has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving this last relation, according to its right; and all that other states or nations, under the general law which pervades all Christendom can properly demand is, that in the exercise of its clear right in this last respect as to its own citizens or subjects, it should pay all, and no more attention, than is practicable to the competing rights and interests of *their* citizens and subjects. It should give to nonresidents and foreigners, parties to such a relation of general legal sanctity, as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action, as can, under such circumstances, be given consistently with any judicial action at all, efficient for the purposes of justice. To say that the general law inexorably demands *personal* notice in order to such action, or, still worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.

It is very evident, upon examining the statutes of the different states of the Union, that legislation vesting jurisdiction for divorce in their courts has followed no principle of general law in this respect whatsoever; some statutes making the jurisdiction, or supposing it, to depend upon the place of the *contract,* some upon the place of the *delictum,* and some, as in this state, and as they should do, upon the *domicil* of the wronged and petitioning party. The courts of each state exercise, as they must, jurisdiction upon the principles laid down for them by statute; and have very little occasion, unless called upon to review the decree of some neighboring state, to attend to or consider any *general* principles pertaining to the subject. Engaged in this latter task, they are very apt to confound the *statute* principles of jurisdiction, to which they are accustomed, with the principles of general law relating to it; notwithstanding the latter so obviously grow out of the right of every state to regulate, in some cases by law, and in others by proper judicial action, according to the nature of the subject, the social condition, or *status,* as it is called, of all persons subject to its jurisdiction. A singular instance of forgetfulness of this principle of "state sovereignty" is afforded by the case of *Hull* v. *Hull,* 2 Strobhart's Equity Appeals, 174; in which the right of the state of Connecticut to dissolve through its courts under the law of that state, a marriage there formed between two of its own citizens, upon the petition of a wife whose husband had deserted her and her children and settled in South Carolina, constructive notice only having been given to the absent and absconding husband, was put upon the ground that dissolution of the *contract* of marriage upon such notice was part of the law of the place of the *contract* and so part of the *contract* itself. The courts of that state, it seems, whilst forgetting the state rights of their northern sister, strenuously insist upon the rights of their own; holding, according to the exploded notion of *Lolley's case,* or rather of *McArthy* v. *McArthy,* that a *South Carolina* marriage cannot be dissolved out of the state of *South Carolina,* although any other may. In *Irby* v. *Wilson,* 1 Dev. & Bat. Eq. R. 568, 576, under similar circumstances, except that in this case the *wife* was the *deserting,* and the *husband* the *petitioning* party, the supreme court of North Carolina held that a *Tennessee* divorce was *void,* upon the ground hinted at in *Lyon* v. *Lyon,* sup., to wit, that such a proceeding being *between parties,* and the wife having been constructively notified only, although such notice was all that was possible, the courts of Tennessee could not alter by way of redress the *status* of one of its own citizens, become burdensome to him by the alleged causeless and continued desertion of his wife. Upon the same principle, and for the same reason, of course, North Carolina could not relieve from the relation, its citizen, the wife, although her husband might have compelled her to flee from him to the only home open to her in that state, by the grossest violation of the duties which their relation to each other imposed; and thus, *both* these conterminous sovereignties would be powerless for justice, over and upon the call of its respective domiciled inhabitant. In Pennsylvania, the jurisdiction is made to depend upon the jurisdiction over the offender *at the time of the offence,* (*Dorsey* v. *Dirsey,* 7 Watts, 349,) as if the *lex loci delicti* were to govern; in Louisiana, upon like jurisdiction, unless the marriage were contracted within the state, when, we suppose, the *delictum* would be regarded as a *breach of contract,* if such by the law of Louisiana in which the contract was entered into. *Edward* v. *Green,* 9 La. Ann R. 317. Thus, we perceive, that by some courts marriage is treated as a species of continuing executory contract between the parties, the obligations of which, and the causes and even modes of dissolving which, are fixed by the law of the place of contract. So sacredly local is it, in the view of some, that it cannot be dissolved but by the courts of the country in which it was formed. Others, perceiving, that though a contract, it is one universally recognized, acknowledge the right of foreign tribunals to act upon it, provided that in doing so, they govern themselves not by the only law which they, it may be by *statute,* can administer, but ascertain whether it has been broken, and so ought to be dissolved, by the law of the place of the contract. Some treat breaches of the contract of every degree as *quasi* crimes, to be punished only in the place in which they were committed, provided the parties be then there domiciled; and others, again, qualify this, by an exception in favor of the tribunals of the place of contract; since there the delicta can be treated as breaches of the contract, if such be the law of the place of contract. If marriage be a contract, or the breach of it a *tort,* it may well be asked, why are they not at least personal in their nature, and transitory in their legal character? passing with the wronged person wherever he or she passes, for redress by any tribunal of the civilized world, which can obtain jurisdiction of the person of the covenant breaker or trespasser?

It is evident from such confusion of decisions and reasons, no general principle worth considering can, by any process, be eliminated. Raising ourselves above this mist of misapplied learning and ingenuity, and looking at the matter simply as it is, it is obvious, that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights, and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized state, and certainly every state of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister, states; that a state cannot be deprived, directly or indirectly, of its sovereign power to regulate the *status* of its *own* domiciled subjects and citizens, by the fact that the subjects and citizens of other states, as related to them, are interested in that *status,* and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether a *mensa et thoro* or *a vinculo matrimonii,* the general law does not deprive a state of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners, or domiciled inhabitants of other states have not or will not become, and cannot be made to become, *personally* subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions; the purpose of such notice being to banish the idea of secrecy and fraud in the proceeding by inviting publicity to it, as well as to give to persons out of the jurisdiction of the court, every chance possible, under the circumstances, of appearing to the proceeding, and defending, if they will, their own rights and interests involved in it.

These views are supported by the practice of the states of Connecticut and Tennessee called in question, as we have seen, by the courts of South and North Carolina, as probably by the practice of many other states, and certainly by the long continued practice of our own. They are sanctioned by the well-considered decision of *Harding* v. *Alden,* 9 Greenl. R. 140, and by that learned jurisconsult, the late Chancellor Kent, in his note on that case, 2 Kent's Com. 110, n. *b*. 4th ed. They are otherwise best sustained by authority. *Tolen* v. *Tolen,* 2 Blackf. 407. *Guembell* v. *Guembell,* Wright, 286. *Cooper* v. *Cooper,* 7 Ohio, 238. *Mansfield* v. *McIntyre,* 10 ib. 27. *Harrison* v. *Harrison,* 19 Alabama, 499. *Hare* v. *Hare,* 10 Texas, 355. See also the whole subject discussed in Bishop on Marriage and Divorce, *passim,* and especially in ch. 34 of that valuable work.

It may be added, that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject have been wisely provided against, by a clause of the constitution of the United States, and can find a remedy under it in the supreme court of the United States, as the court of last resort, in cases demanding its application. By art. 4, sect. 1, of the constitution of the United States, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." As this has been construed by the highest authority to give in every other state the same effect to a judgment or decree of a state court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a state of the Union; and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them.

Although, as a general doctrine, the domicil of the husband is, by law, that of the wife; yet when he commits an offence, or is guilty of such dereliction of duty in the relation, as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicil of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish, in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicil of her own; and especially, if a native of the state to which she flies for refuge, is, upon familiar principles, readily redintegrated in her old domicil. This is the well-settled doctrine of law upon the subject, (Bishop on Marriage and Divorce, §§ 728-730 incl. and cases cited,) and has by no court been more ably vindicated than by the supreme court of Massachusetts. *Harteau* v. *Harteau,* 14 Pick. 181, 185.

A more proper case for the application in favor of a petitioner for divorce of the foregoing principles relating to the jurisdiction of the court over her case, and to the question of her domicil in this state, can hardly be imagined, than the case at bar. The petitioner is the daughter of a native of this state, who, though formerly resident in Boston, has for many years past been domiciled in his native place, Little Compton. Whilst at school, the petitioner became acquainted with an Englishman of the name of Ditson, and, in 1842, married him, without the knowledge or consent of her parents, in New York. Immediately after marriage the couple went to Europe, and from thence to Cuba, where they lived together several years. Upon their return to this country, she being in a feeble and emaciated condition, he deserted her for the first time in Boston, and was absent in Europe, without leaving any provision for her, for about two years. Upon his return, they appear to have lived together again; he, however, giving every indication of a morose as well as inattentive husband. After a short time, he deserted her again in Boston, declaring, upon his leaving it for Europe that he cared nothing about it, or any person in it, pointing, as the testimony is put to us, to his unfortunate wife. He has been absent from her now between three and four years, without communicating with her, or providing, though of sufficient ability, any thing for her support, nor does she know where he is, except that he has gone to Europe. In the mean time, deserted as she was, she was obliged to return to her father's house in Little Compton; where, during this time, supported by him or by her own exertions, she has resided, with the exception of about three months passed by her in Newport, Rhode Island. For this desertion and neglect to provide for her, the proof, *ex parte* it is true, but coming from respectable sources, finds no excuse in her conduct, which, according to it, has always, so far as known, been that of a dutiful and faithful wife. We reserved this case, the first on the circuit which presented the question before discussed for consideration, it being admitted that the husband of the petitioner had never resided with her in this state, or even as the proof showed, been within its borders, and was now abroad in parts unknown, and was not, of course, personally served, because under such circumstances he could not be personally served with the ordinary citation issued by us to a resident defendant to such a petition. Under the authorized rule of this court, in regard to constructive notice to an absent defendant to a petition for divorce, upon affidavit of the facts, six weeks' notice of the pendency of this petition was given, by publishing the same for the space of six weeks next before the sitting of the court at this term; and it is evident that the husband of this lady knows, as from his conduct it is apparent that he cares, nothing about this proceeding. Whatever was the former domicil of the petitioner, we are satisfied that she is, and has, for upwards of the last three years, been a domiciled citizen of Rhode Island,—her only home, in the house of her father; and that, as such citizen, and upon such notice, we have power and jurisdiction over her case, and to change her condition from that of a married to that of a single woman, granting to her the relief, which, under like circumstances, the law and policy of Rhode Island accords to all its citizens. Let a decree be entered divorcing Mary Ann Ditson from George L. Ditson, and annulling the bond of matrimony now subsisting between them; and that the name of the said Mary Ann Ditson be changed to, and she be hereafter known and called by the name of Mary Ann Simmons, according to the prayer of her petition.

ROTH v. ROTH, 104 ILL. 35, 1882).

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

The record in this case shows that John George Roth, a subject of the kingdom of Wurtemberg, came to this country, and settled in Chicago at an early day, and there accumulated a large amount of property, consisting chiefly of real estate, which is the subject of controversy in this suit; that in 1855 he married, in Chicago, Madelaine Moser, a native and subject of France, who had a short time before accompanied him on a return visit from that country to this; that in 1856 they returned to Europe, and on their arrival in that country, or shortly afterwards, owing to certain difficulties and misunderstandings, a separation took place, resulting in her returning to reside with her father, in Alsace, France, her former domicile and residence, and in his establishing a new residence in Schorndorf, in the said kingdom of Wurtemberg, where he continued to reside until the time of his death, which occurred on the 12th of July, 1876; that in 1862 his wife returned to this country and instituted proceedings for a divorce, where she was shortly afterwards followed by her husband, and through his influence induced to abandon the divorce suit and return with him to Schorndorf, where they again resumed marital relations, which were continued until October, 1870, when he commenced legal proceedings in the proper court, at their domicile in Wurtemberg, to procure a decree of nullity of their marriage on the ground it had been entered into on his part in violation of the laws of the kingdom of Wurtemberg, of which he was at that time a subject; that on the 24th of April, 1873, the cause was brought to a final hearing, both parties being present, and represented by their respective counsel, resulting in a decree declaring the marriage a nullity, on the ground just stated; that the court in which the decree was rendered had jurisdiction, both of the parties and the subject matter of the suit, and under the laws of Wurtemberg had full power and competent authority to enter the decree; that on the 9th of September following, in consideration of $8000 in United States bonds paid to her by Roth, Madelaine, his former wife, released to him all her interests, whatever they might be, in the property in controversy; that on the 27th of November following, Roth contracted a second marriage with Amalie Staehle, who now claims the estate in controversy; that after the marriage of Amalie and Roth, on the 28th of March, 1874, they entered into an agreement known to laws of Wurtemberg as a "marriage and inheritance contract," by which it was provided they were to hold the property belonging to them respectively during their joint lives as common property, with the right of survivorship to the longer liver, subject to the payment of their debts, the education and marriage portions of their children, and to the payment by her, in the event she survived him, of certain legacies to his relations, amounting altogether to 80,000 florins, which contract was duly approved and confirmed by the proper court of that country; that immediately before his death, and with a view of enabling his wife to carry out the contract just mentioned, Roth conveyed, or attempted to convey, the property in controversy to her brother, Albert Staehle, but that whatever interest passed by it was subsequently reconveyed by him to Amalie; that after Roth's death, on the 25th of September, 1876, Madelaine visited Schorndorf, and while there spent much of her time with Amalie, and accepted of her various presents, etc.; that on the 26th of the same month, Madelaine, in consideration of 10,000 marks, released to Amalie all claims to and upon her late husband's estate, and on the 3d of October following, executed to her a deed to the property in controversy; that Roth, at the time of his death, left no child or children, or descendants thereof.

Under these circumstances, in 1878, the present bill was filed by Madelaine, in the Superior Court of Cook county, against

Amalie and the heirs at law of Roth, in and by which she claims that the marriage between her and Roth was a legal and valid marriage; that the decree of the Wurtemberg court, and all the proceedings upon which it is based, were and are null and void, and that she is therefore the lawful widow and heir of her said husband, and as such entitled to a partition and division of his estate, under the statute. Amalie answered the bill, and also filed a cross-bill, setting up the facts above recited, and relying on them to establish her rights, as the survivor and lawful widow of Roth, to the property in dispute. A cross-bill was also filed by the heirs of Roth, setting up their rights in the premises. The court found the equities with Amalie upon her cross-bill, and entered a decree dismissing the original bill, and directing the heirs of Roth to be paid the amount due them under the "marriage and inheritance contract." That decree has been performed as to the heirs of Roth, and Madelaine Roth alone brings the case by appeal to this court for review.

Mr. C. M. HARRIS, for the appellant:

Penal laws are strictly local, and those of one country can not be regarded in another. *Folliott* v. *Ogden,* 1 H. Bl. 135; *Ogden* v. *Folliott,* 3 Term, 733; *Warrender* v. *Warrender,* 3 Cl. & Fin. 538; *Commonwealth* ,v. *Green,* 17 ,Mass. 548; Story's Const. 16, secs. 91, 104; Dicey on Domicile, 160.

Statutes restricting the liberty of marriage are penal. *Hodgkinson* v. *Wilkheir,* 1 Hagg. Const. 262.

That the validity of a marriage depends on the law of the country where it is celebrated, see Bishop on Marriage and Divorce, sec. 371; *Dalrymple* v. *Dalrymple,* 2 Hagg. Con. 54, 4 Eng. Ecc. 485; *Ruding* v. *Smith,* id. 371, id. 551; *Middleton* v. *Janverin,* id. 437, id. 582; *Scrimshire* v. *Scrimshire,* id. 385, id. 565.

A foreign decree has no extra-territorial force, save through comity. Woolsey on International Law, sec. 75; Story's Conflict of Laws, 603-607.

If it conflicts with reason and justice, or if the court has proceeded upon false premises or inadequate reasons, or mistake of local or foreign law, it will not be enforced elsewhere. *Simonin* v. *Mallac,* 2 Sw. & Tr. 67; *Simpson* v. *Fogo,* 32 L. J. Ch. 249;

Parsons on Contracts, 606; Wharton on International Law, 747; *Don* v. *Lipman,* 5 Cl. & Fin. 20; *Novelli* v. *Rossi,* 2 B. & Ad. 757; *Reimers* v. *Druce,* 23 Beav. 145.

Such decree will not be enforced when it will directly or indirectly give effect to an act which infers a scandal on society or a breach of national morals and decency, or when it would be detestable or pernicious, as, the enforcement of a contract with a prostitute for her prostitution, although valid when made. *Birthwhistle* v. *Vardill,* 5 B. & C. 455; *Fenton* v. *Livingston,* 3 Macq. 537; *Bank of Augusta* v. *Earl,* 13 Pet. 518; *Greenwood* v. *Cartes,* 6 Mass. 358.

A marriage settlement made in a foreign country does not of itself affect real estate here, and can, if at all, only by suit under the laws of this State. 73 Ill. 285; 15 La. Ann. 317.

Executory contracts do not transmit title. *Olney* v. *Howe,* 89 Ill. 556.

An executory agreement, or imperfect conveyance upon a merely voluntary consideration, will not be enforced or aided in equity. 64 Ill. 548; 1 White & Tudor's Leading Cases, 420, 427; 1 Select Cases, (Ala.) 535.

Messrs. ROSENTHAL & PENCE, for the appellee Amalie S. Roth:

Where a contract to marry is executed, its nature as a contract is merged in the higher nature of a *status,* and the contract no longer exists. This *status* travels with the spouses wherever they go, and becomes subject to the laws of the State where the parties may become domiciled, and is there under control of the sovereign power. 1 Bishop on Marriage and Divorce, secs. 3, 667; Story's Conflict of Laws, secs. 228-230; *Barber* v. *Root,* 10 Mass. 265; *Strader* v. *Graham,* 10 How. 82; *Maguire* v. *Maguire,* 7 Dana, 181; *Cheever* v. *Wilson,* 9 Wall. 108; *Harrison* v. *Harrison,* 19 Ala. 499; *Harvie* v. *Farnie,* L. R. 5 P. D. 153; 43 L. T. R. 738.

It is clearly competent for every nation to say that certain marriages of its subjects or citizens shall be invalid, wherever they may be contracted. Story's Conflict of Laws, secs. 114d, 117; Foote's Priv. Int. Jur. 273; 1 Burge on Colonial Law, 188,

195, 196; Wharton's Conflict of Laws, sec. 161; Lawrence's Wheaton, 172; 4 Phillimore's International Law, 29; Piggott's Foreign Judgments, 167, 168; Maxwell on Stat. 119; *Fenton* v. *Livingstone,* 5 Jur. N. S. 1183; 3 Macq. 497; *Sussex Peerage Case,* 11 Cl. & F. 85; *Sottomayer* v. *De Barros* L. R. 3 P. Div. 5; *Mette* v. *Mette,* 1 Sw. & Tr. 416; *Brook* v. *Brook,* 3 id. 481; *Warrender* v. *Warrender,* 2 Cl. & F. 529.

If an incapacity to marry exists in a State of which the parties are citizens or subjects, and if the marriage of persons possessing such incapacity is declared by the statute of their State to be null and void wherever the same may be contracted, and if such persons go to another State where such incapacity does not exist, and there marry, and then return to their own State, such marriage will be held null and void in the latter State. *Kinney's Case,* 30 Gratt. 858; *Williams* v. *Oatis,* 5 Ired. 535; *State* v. *Kennedy,* 76 N. C. 251; *Dupree* v. *Boulard,* 10 La. Ann. 411; *Commonwealth* v. *Lane,* 113 Mass. 458; *Commonwealth* v. *Hunt,* 4 Cush. 49; *Medway* v. *Needham,* 16 Mass. 157.

Where, by the positive law, consent of government is required to marry, such want of consent will invalidate the marriage. *Sussex Peerage case,* 11 Cl. & F. 85; *Sottomayer* v. *De Barros,* L. R. 3 P. Div. 5; *Fenton* v. *Livingstone,* 5 Jur. N. S. 1183; Story's Conflict of Laws, sec. 114 d.

Every country must be permitted to judge of the policy of its own law, and to enforce the same. This is a maxim of international law. 1 Bishop on Marriage and Divorce, sec. 368; Story's Conflict of Laws, secs. 18, 19, 21, 22, 23, 25; Savigny, note a, 38, 40; *Bank of Augusta* v. *Earle,* 13 Pet. 518; *Cin. Mutual H. A.* v. *Rosenthal,* 55 Ill. 91; Wharton's Conflict of Laws, (2d ed.) secs. 65, 207.

The *status* of all persons is controlled by the law of the nation to which they belong, and in which they are domiciled. Westlake's Private International Law, p. 24, *et seq.* 80; Story's Conflict of Laws, secs. 223, 224, 228-230; Wharton's Conflict of Laws, secs. 211, 213, 220, 800; 1 Bishop on Marriage and Divorce, secs. 367-369; Guthrie's Savigny's Private International Law, 248;

2 Kent, 107, note; Hubback on Succ. 335; Bigelow on Estoppel, 159 160; Piggott on Foreign Judgments, 167, 168; *Shaw* v. *Gould*, L. R. 3 H. L. 56; *Kinnier* v. *Kinnier*, 45 N. Y. 535; *Hunt* v. *Hunt*, 72 id. 228; *Barber* v. *Root*, 10 Mass. 260; *Cheever* v. *Wilson*, 9 Wall. 108; *Strader* v. *Graham*, 10 How. 82; *Dorsey* v. *Dorsey*, 7 Watts, 349; *Ditson* v. *Ditson*, 4 R. I. 87; *Udny* v. *Udny*, L. R. 1 Scotch App. 441.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

In the view we take of this case we do not deem it necessary to follow counsel in the wide range their exhaustive and elaborate arguments have taken, but shall confine ourselves to one or two of the topics discussed in the briefs, which we regard as conclusive of the controversy, whatever may be our views with respect to the other issues in the case.

So far as the marriage between Roth and Madelaine Moser is concerned, we have no hesitancy in saying that for all purposes, in this State, it was a legal and valid marriage, notwithstanding Roth, at the time, was a subject of the kingdom of Wurtemberg, and had not obtained a license authorizing such marriage from the sovereign of that kingdom, as required by the laws thereof. As both the parties were domiciled here at the time of its celebration, it is not important to determine whether the validity of a marriage depends upon the *lex domicilii* or the *lex loci contractus*, for whatever conclusion might be reached upon that question, the result would be the same, so far as this case is concerned. Both laws being identical, if the marriage was in conformity with either it must necessarily have been with the other also, and as it seems to have been solemnized in strict conformity with our statute regulating the subject, and as the parties were manifestly competent, under our own laws, to contract the relation, it follows, as before stated, the marriage was valid and binding.

While this marriage was clearly valid here for all purposes whatsoever, it does not follow that upon the return of the parties to the country of their nativity, and of which they were still subjects, it would or ought to be held equally valid there, for it is clearly settled by the decided weight of private international law, so called, that every State has the power to enact laws which will personally bind its citizens or subjects when sojourning in a foreign jurisdiction, provided such laws in terms profess to so bind them when thus circumstanced. It is true, such laws have no extra-territorial effect so as to authorize their enforcement in a foreign country, and may, therefore, so far as their execution is concerned, be said to remain dormant till the return of those violating them, when they will be enforced in the same manner, and to the same extent, as if their infraction had occurred within the State enacting them. Story on Conflict of Laws, secs. 114 d, 117, 244, 22; Wharton on Conflict of Laws, sec. 161; Lawrence's Wheaton, p. 172; 4 Phill. Int. Law, 29, sec. 34; Piggott on Foreign Judgments, 167, 168; Dicey on Domicile, p. 215; 1 Burge on Col. Law, 188, 195, 196; 1 Bishop on Marriage and Divorce, sec. 368; *Sussex Peerage case,* 11 Cl. & Fin. 85; *Brook* v. *Brook,* 9 H. L. Cases, 193; *Fenton* v. *Livingstone,* 3 Macq. 497; *Mette* v. *Mette,* 1 Sw. & Tr. 416; *Van Voorhis* v. *Brintnall,* 86 N. Y. 18; *Commonwealth* v. *Lane,* 113 Mass. 458.

Nor does it follow the *status* or relation created by the marriage could only be annulled by our own courts, or that it could only be annulled by other courts for such causes as would be recognized as sufficient for that purpose under our own laws. When the parties returned to Wurtemberg and acquired a new domicile there, so far as their personal rights and relations are concerned our laws and government ceased to have any power over them or concern with them. Personally the State had no claims on them, and they owed it no allegiance or duty. *Barber* v. *Root,* 10 Mass. 260; *Hunt* v. *Hunt,* 72 N. Y. 228; *Kinnier* v. *Kinnier,* 45 id. 535; *Cheever* v. *Wilson,* 9 Wall. 108; *Ditson* v. *Ditson,* 4 R. I. 87; *Harvey* v. *Farnie,* L. R. 5 P. D. 153; same case affirmed, L. R. 6 P. D. 35; Story on Conflict of Laws, secs. 211, 213; 1 Bishop on Marriage and Divorce, secs. 367, 368; Wharton on Conflict of Laws, sec. 211; Guthrie's Savigny on Private Internat. Law, p. 248. Whether the kingdom of Wurtemberg, on their return and acquiring a new domicile there, would recognize the *status* or relation which they had contracted here, depended upon its own laws, and not upon ours. That kingdom, in 1808, adopted an ordinance or law, which was in full force at the time of the marriage in Chicago, declaring all such marriages in a foreign State, without the license of the sovereign, absolutely null and void. It was, therefore, according to the general current of authority on the subject, entirely competent for the courts of that kingdom having jurisdiction of such matters, to give effect to that law by annulling and setting aside the marriage, upon a proper application for that purpose, which was done in this case. 1 Bishop on Marriage and Divorce, secs. 367, 368; Story on Conflict of Laws, secs. 18, 19, 21-23, 25; Wharton on Conflict of Laws, (2d ed.) sec. 207; 4 Phill. on Int. Law, secs. 3, 11, 12, 13, 16, 24, 25; Guthrie's Savigny on Private Int. Law, 248.

Ordinarily, where a party, upon a change of domicile, goes into another State or country, the personal *status* which he carries with him will be recognized by the courts of the latter country. This is certainly the general rule, but it is subject to certain well recognized exceptions. If, for instance, such *status* has been acquired, as in the present case, by a violation of an express provision of the positive law of the State in which its recognition is asked, or if it be contrary to the genius and spirit of its institutions, as a title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well being of society, or to public morality and decency, in all such cases the *status* would not and should not be recognized by the courts of the latter State. 2 Kent, *p. 458; Wharton on Conflict of Laws, (2d ed.) secs. 207, 165; Story on Conflict of Laws, secs. 98, 244; 4 Phillimore on Int. Law, (ed. 1861,) p. 529; *Brook* v. *Brook,* 9 H. L. Cas. 193; *Cincinnati Mutual Health Ass.* v. *Rosenthal,* 55 Ill. 91; *Forbes* v. *Cochrane,* 2 B. & C. 448; *Mette* v. *Mette,* 1 Sw. & Tr. 416; *Commonwealth* v. *Lane,* 113 Mass. 458; *Van Voorhis* v. *Brintnall,* 86 N. Y. 18.

Assuming the compromises of appellant with Amalie and Roth, respectively, relating to her interest in the latter's estate, were made by her in ignorance of her rights, and that they were effected through the fraud and misrepresentation of them, and others acting in concert with them, as is claimed by her, of which we express no opinion, at least for the present, it follows the result of this case must depend chiefly upon the legal effect which must, under the circumstances stated, be given by the courts of this State to the decree rendered by the Wurtemberg court annulling the marriage, and this we regard as the vital question in the case. The general rule unquestionably is, where it affirmatively appears the court of a foreign State has jurisdiction of the parties and subject matter of the suit, its judgment or decree will be conclusive on the parties, their legal representatives and privies, in all countries where the matters litigated are again drawn in question, and this is particularly true with respect to judgments or decrees affecting the *status* of a person, for they are in the nature of judgments *in rem*, which are binding on the whole world. Wharton's Conflict of Laws, secs. 800, 801, 802, 815, 816, 817, 822, 835; Bigelow on Estoppel, 170, 178; Freeman on Judgments, sec. 528; 2 Bishop on Marriage and Divorce, sec. 755; Foote on Private Int. Jur. 473, 474; Guthrie's Savigny on Private Int. Law, sec. 373, note c; *Harvey* v. *Farnie*, L. R. 5 P. D. 153; *Gould* v. *Crow*, 57 Mo. 200; *Rose* v. *Himely*, 4 Cranch, 162; *Hobbs* v. *Henning*, 17 C. B. (N. S.) 821; *Doglioni* v. *Crispini*, L. R. 1 Eng. & Irish App. 301.

The above rule is also fully recognized by this court. (*Baker* v. *Palmer*, 83 Ill. 568.) The limitation to this rule is, that it may be shown that such judgment or decree was obtained by means of fraud, or some gross abuse of the process of the court, or flagrant departure from the ordinary course of judicial procedure, as, for instance, that a party in interest sat as a judge in the cause. Foote on Private Int. Jur. 456, 472; 2 Story's Eq. Jur. sec. 1582; Piggott on For Judgments, 116; Westlake on Private Int. Law, (last ed.) secs. 309, 310; *Crowley* v. *Isaacs*, 16 L. T. (N. S.) 529; *Ochsenbein* v. *Papelier*, L. R. 8 Ch. App. 695.

While it is claimed by counsel for appellant, in general terms, that the court rendering the decree in question acted without jurisdiction, and that the same was obtained by fraud, yet we fail to discover anything in the record to warrant either of these charges. It is not sufficient, as it has often been held by this court, for the purpose of successfully assailing a transaction on the ground of fraud, to charge fraud generally; but the complain-ing party must state in his pleading, and prove on the trial, the specific acts or facts relied on as establishing fraud. That has not been done in this case. So far as we are able to discover, the trial was perfectly regular, and conducted with the utmost fairness, and we see no ground to question the jurisdiction of the court. The depositions of persons learned in the law of that country have been taken in this cause, and they clearly show the several courts through which that case passed during its pendency, were, by the laws of that country, the proper tribunals to take cognizance of cases of that character in the manner it was done. And it is further shown that both parties appeared in the cause, by themselves and counsel. Hence, as before stated, we see no ground for questioning the jurisdiction of those tribunals. We are of opinion, therefore, the decree of nullity must be given in the courts here the same effect which would be given to it by the courts of the country in which it was rendered. The effect of the decree there, as we understand it, was not merely to establish conclusively the nullity of the contract of marriage, or of the marriage itself. but also to annul and terminate the *status* or marital relation of the parties which arises from a *de facto* as well as a *de jure* marriage, so as to leave them in precisely the same condition as if no marriage had ever taken place between them. This being the effect of the decree there, it must be given the same effect here. *Barber* v. *Root,* 10 Mass. 260; *Ross* v. *Ross,* 129 id. 243; *Kinnier* v. *Kinnier,* 45 N. Y. 535; *Hunt* v. *Hunt,* 72 id. 228; *Harvey* v. *Farnie,* L. R. 5 P. D. 153; *Roach* v. *Garan,* 1 Ves. Sr. 159; *Collington's case,* 2 Swanst. 326, note; 2 Kent's Com. *p. 107; 2 Bishop on Marriage and Divorce, sec. 754; 1 id. secs. 354, note, 355; Wharton on Conflict of Laws, (2d ed.) secs. 1-3, 213, 671; Story on Conflict of Laws, secs. 37, 595, 597; 4 Phill. on Int. Law, (new ed.) secs. 836, 839; Freeman on Judgments, sec. 579; Foote on Private Int. Jur. 473, 474.

Such, then, being the legal operation of the decree, it follows that the appellant was not at the time of Roth's death his wife, either *de facto* or *de jure,* and hence she is not his widow, for no one answers that description who was not his wife at the time of his death, and consequently she has no right, as such, to succeed to his estate. (*Hood* v. *Hood,* 110 Mass. 463.) For the same reasons it follows that the subsequent marriage between Roth and Amalie was lawful and valid, and that relation having continued up to the time of his death, it results that she, and not appellant, is his lawful widow, and as such is entitled to his estate. It is true the "marriage and inheritance contract" did not, upon his decease, have the effect of clothing her with legal title to the real estate in controversy, as his survivor, as it doubtless would have done had the property been situated in the kingdom of Wurtemberg instead of here; for it is not competent for parties, here or elsewhere, by mere agreement, to change the manner of transferring real property in this State, but the agreement in question, upon his decease, operated as an equitable assignment of the estate to her, which was properly enforced by the decree in this case. Story on Conflict of Laws, secs. 143, 159, 184; Westlake on Private Int. Law, (new ed.) secs. 34, 35, 205; ibid. (old ed.) secs. 99, 371; *Decouche* v. *Savetier,* 3 Johns. Ch. 190; *Besse* v. *Pellochoux,* 73 Ill. 285.

Having reached the conclusion stated with respect to the decree of nullity, it is therefore unnecessary to discuss the effect of the compromise above aluded to, and relied upon as an estoppel by appellee. Whatever our views might be with respect to that matter, we are of opinion the law is with the appellee, on the grounds already stated.

Decree affirmed.

LEGITIMACY.

BLYTHE v. AYRES, 96 CAL. 532, (1892).

APPEAL by the "Williams heirs" from a judgment of the Superior Court of the city and county of San Francisco declaring Florence Blythe to be the sole heir of Thomas H. Blythe, deceased.

The court below found that the real name of the deceased was Thomas H. Williams, that he had no heirs in the direct line except the plaintiff, Florence Blythe, and that the persons known as the "Williams heirs" were next of kin to him in the collateral line. There are numerous other claimants, who contest the finding in favor of the Williams heirs, on behalf of whom briefs were permitted to be filed upon this appeal by their counsel as *amici curiae*. Further facts are stated in the opinion.

GAROUTTE, J.—This is an action instituted under section 1664 of the Code of Civil Procedure by the plaintiff, a minor, through her guardian, to determine the heirship and title to the estate of Thomas H. Blythe, deceased. The section provides that in all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in part of such estate, may, at any time after the expiration of one year from the issuance of letters testamentary or of administration, file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made. The case is most important, from any view. The defendants, claiming to be collateral kindred, are numbered by the hundred, many of them represented by separate counsel of great ability and experience in the law; the property interests involved are very large; the trial in the *nisi prius* court extended continuously through the greater portion of a year; the facts are novel, and the principles of law applicable many and complicated.

Plaintiff's claim is based upon sections 230 and 1387, respectively of the Civil Code of California. Section 230 reads as follows:—

"Sec. 230. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

Section 1387, as far as it pertains to the matters involved in this litigation, provides:—

"Sec. 1387. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child."

As a result of the trial, the court filed findings of fact, and its conclusions of law based thereon are to the effect that the plaintiff, Florence Blythe, was and is the child of Thomas H. Blythe, deceased; that said Thomas H. Blythe legally adopted her under the provisions of section 230 of the Civil Code; that she is his lawful heir, and the only person entitled to have and receive distribution of the estate of said Thomas H. Blythe, deceased.

The principles of law and the facts of the case bearing upon her contention under these respective provisions of the code are entirely dissimilar, involving a separate discussion; and in the construction of section 230, our investigation also necessarily divides itself into two distinct branches.

1. Was plaintiff so domiciled with relation to her putative father's domicile as to have rendered any action of his looking to adoption available for that purpose? or, placing the interrogatory in the clear and emphatic language of appellants' counsel (to which interrogatory they all with great confidence give answer, Yes), Was she so domiciled or so situated that she could not be subject to the laws of California, and be by those laws transmuted from bastardy to legitimacy?

2. If her situation endowed her with the capacity for legitimation, did the acts of Blythe bring her within the requirements of the statute?

The facts found by the court which face us while we are engaged in a consideration of the first branch of this subject may be succinctly and substantially stated as follows:—

1. That plaintiff was born in England, upon December 18, 1873, and was the issue of Thomas H. Blythe and Julia Perry;

2. That Julia Perry was a native of England, domiciled therein, and continued to there reside until one month after the death of said Blythe;

3. That plaintiff remained in England until after the death of Blythe, when she came to California, and said Blythe was never at any time within any of the countries of Europe after the twenty-ninth day of August, 1873;

4. That said Blythe was a citizen of the United States, and of the state of California, domiciled in said state, and died intestate therein, April 4, 1883, leaving surviving him no wife, no fa-

ther, no mother, and no child, save and except said Florence Blythe, the plaintiff herein;

5. That said Thomas H. Blythe and said Julia Perry never were married, and said plaintiff was begotten while said Blythe was temporarily sojourning in England, and was born after said Blythe's return to California, and that said Blythe never was married.

Before passing to the merits of the discussion, we pause a moment to say that the verb "adopts," as used in section 230, is used in the sense of "legitimates," and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. (See law dictionaries,—Bouvier's, Black's, Anderson's, and Rapalje's.) This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law-writers of the day who have written upon the subject; and for the reason that the text-writers and the decisions of courts, to which we shall look for light and counsel, treat the subject as a question of legitimation, we shall view the matter from that stand-point.

The section is broad in its terms. It contains no limitations or conditions, and to the extent of the power vested in the legislature of the state, applies to all illegitimates, wherever located and wherever born. The legislature has not seen fit to make any exception to its operation, and as was said by Taney, C. J., in *Brewer v. Blougher*, 14 Pet. 178, when considering a quite similar provision of a statute: "In the case before us, the words are general, and include all persons who come within the description of illegitimate children, ... and when the legislature speaks in general terms of children of that description without making any exceptions, we are bound to suppose they design to include the whole class."

Bar, in his work on International Law (p. 434), says: "Legitimation of bastards, either by subsequent marriage or by an act of the government (*Rescriptum principis*), is nothing but a legal equalization of certain children illegitimately begotten with legitimate children." In other words, the object and effect of section 230 is to change the *status* and capacity of an illegitimate child to the *status* and capacity of a child born in lawful wedlock.

This case, upon its facts, presumably stands alone in legal jurisprudence, for counsel, in the exercise of great learning and unexampled industry, have failed to parallel it. We have here a father at all times domiciled in the state of California, a mother at all times domiciled in England, and an illegitimate child born in England, and continuously there residing until the death of her father in California. As to the effect of our statutes upon such a state of facts, the consideration of the matter of domicile of these parties, and the principles of law applicable thereto, is a most important element to its proper determination, and it is a source of some satisfaction to be able to say that there are elementary principles pertaining to this subject of domicile, even though few in number, upon which practically all the text-writers stand on common ground, to wit:—

1. The domicile of the mother is the domicile of the illegitimate child, and the place of birth of the child is an immaterial element.

2. In a case of *legitimatio per subsequens matrimonium,* the place of marriage does not affect the question.

3. Legitimation by a subsequent marriage depends upon the law of the domicile of the father; Dicey on Domicile, 181, and other text-writers, supported by many authorities, holding that the domicile of the father at the date of the birth is the vital inquiry, and other authority (Fraser on Parent and Child, 52; Bar on International Law, 434; Savigny on Private International Law, 302) holding that the domicile of the father at the date of marriage is the determinative fact.

Inasmuch as the deceased, Blythe, was domiciled in California both at the time of the birth of the child and at the time he performed the acts which it is claimed resulted in legitimation, this question does not become an issue in the case, and we are not called upon to dispel the clouds of doubt that envelop it.

The contention of appellants that the *status* of a person residing in a foreign country and a subject thereof cannot be changed by acts performed in California, under a provision of the law of our state legislature, cannot be supported as a rule without many exceptions, and to the extent of those exceptions, a state law must be held, by its own courts at least, to have extraterritorial operation. And this principle of the foreign operation of state laws even goes to the extent that in many instances such laws are recognized and given effect by the courts of that particular foreign jurisdiction. The doctrine of extraterritorial operation of state laws is fully exemplified in the case of *Hoyt* v. *Thompson,* 5 N. Y. 340, where the court says: "It is a conceded principle, that the laws of a state have no force, *proprio vigore,* beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. This courtesy, or comity, is established, not only from motives of respect for the laws and institutions of the foreign countries, but from consideration of mutual utility and advantage."

The case of *Burton* v. *Burton,* 1 Keyes, 359, is a striking illustration of the operation of a law of the United States in affixing a different *status* to a foreign subject resident in a foreign country. In that case, after plaintiff's marriage to Burton in a foreign land, he himself being a foreign resident and subject at the time, he emigrated to the state of New York, was naturalized, and there died. Although an actual resident of England at all times, upon the death of her husband she came to New York, and claimed her right of dower, upon the ground that she was a citizen of the United States, made so by virtue of the naturalization of her husband under a general act of Congress to that effect, and her claim was upheld. In conclusion, the court uses this language: "It is said, furthermore, that she did not, by residence, or in any other way, assume the allegiance of the United States, or give her assent to the citizenship conferred by the act. This, however, was not necessary, to entitle her to claim its benefits." In *Headman* v. *Rose,* 63 Ga. 458, the same question was again presented, and that court said: "When the claim was first presented here as to whether Mrs. Rose could claim to be a citizen of the United States under the provisions of that act of Congress (having never been in the United States until after the death of her husband), we were all inclined to the opinion that she could not, but upon a more careful examination of that statute, in the light of the interpretation which has been given to it by the supreme court of North Carolina in *Kane* v. *McCarthy,* 63 N. C. 299, and by the court of appeals of New York in *Burton* v. *Burton,* 1 Keyes, 371, and in *Kelley* v. *Owen,* 7 Wall. 496, in which the supreme court of the United States cites the case of *Burton* v. *Burton,* 1 Keyes, 359, approvingly, we hold and decide that if Mary Rose was married to William Rose, the intestate, and he was a naturalized citizen of the United States, then she, by the terms and provisions of the act of Congress of 1855, was also a citizen of the United States." It will be noticed that these decisions are not based upon the principle that the domicile of the husband was the domicile of the wife, and that consequently she was deemed to be in this country at the date of his naturalization, and therefore came under the operation of the act, but they rest upon the broad principle that Congress has not only the power to say what aliens shall become citizens of the United States, but what acts shall create such citizenship. The fact that these cases bear upon the political *status* of the party, rather than upon his civil *status,* does not weaken their force as authority here. In principle, no distinction can be discerned in this regard. In both cases there is involved an exercise of the same sovereign power. This doctrine has been carried to still greater lengths in criminal cases, where a crime has been committed in a foreign jurisdiction. In the Warrender case, 2 Clark & F. 539, Lord Brougham remarked: "But it may be said that the offense being committed abroad, and not within the Scotch territory, prevents the application to it of the Scotch criminal law. To this it may, however, be answered, that where a person has his domicile in a given country, the laws of that country to which he owes allegiance may visit even criminal offenses committed by him out of its territory. Of that we have many instances in our own jurisprudence; murder and treason committed by Englishmen abroad are triable in England, and punishable here. Nay, by the bill which I introduced in 1811, and which is constantly acted upon, British subjects are liable to be convicted of felony for slave-trading, in whatever part of the world committed by them."

Section 215 of the Civil Code is as follows:—

"Sec. 215. A child born before wedlock becomes legitimate by the subsequent marriage of its parents."

This section takes a wide range; its operation is not confined within state lines; it is as general as language can make it; oceans furnish no obstruction to the effect of its wise and beneficent provisions; it is manna to the bastards of the world. If Blythe, subsequent to the birth of plaintiff, had returned to England and married Julia Perry, such marriage, under the provision of law just quoted, *ipso facto,* would have resulted in the legitimation of Florence Blythe. Then, in answer to the interrogatory of appellants already noticed, we say that she was so domiciled that by the laws of California she could have been changed from bastardy to legitimacy. Our statute, conjoined with principles of international law, would have changed her bastardy to legitimacy in the world at large; and regardless of international law, and regardless of all law of foreign countries, our statute law alone would have made her legitimate in the world at large, whenever and however that question should present itself in the courts of California. And we also have here a most striking illustration of the extraterritorial operation of California law. We have the effect of a statute of this state attaching to a state of facts where the mother and child were never in California, but residing and domiciled in England, and the marriage taking place in England; and California law, as stated, has the effect upon that child to give it a different domicile, and completely change its *status.* Such would not only be the effect of this law upon the child viewed by California courts, but such would be its effect viewed by the courts of England, where the child was domiciled, and that, too, notwithstanding no provisions of law are there found for the legitimation of bastards. This assumption of Blythe's marriage to Julia Perry, in its facts, forms an exact photograph of the celebrated case of *Munro* v. *Munro,* found in 1 Rob. App. 492,—a case crystallizing the judicial thought of the age upon the subject, and commanding the respect of all writers and judges upon the law of domicile. We shall make copious references and indulge in liberal quotations from that decision, for its legal soundness never has been questioned, and as we view the subject, it casts a flood of light upon many matters involved in the investigation at hand.

Munro, a Scotch gentleman of fortune domiciled in Scotland, while upon a visit to London, cohabited with an Englishwoman domiciled in England, and a child was the result of such cohabitation. He subsequently married the woman in England, and it was held, under the law of Scotland, by the House of Lords sitting as a court of appeal (although if it had been a case appealed from the English courts, the decision would, undoubtedly, have been the same), that such child was thereby legitimated, Scottish law providing for legitimation *per subsequens matrimonium.* It was there said: "It is maintained that the pursuer having been born in England of an Englishwoman not married at the time of the birth, she was born an illegitimate child; that that *status* of illegitimacy was indelible by the law of England; and that a subsequent marriage, even taking it to be a Scotch marriage, could not legitimate the child, or wipe off the indelible stain of illegitimacy. We cannot assent to this proposition, and with all possible deference to any different opinions, we know of no authority for it in the law of Scotland, or among the jurists and writers on general law, in the application here attempted to be made of it. . . . . To say, again, that because the child was born in England of an English mother, her illegitimacy is indelible, if this means that it is indelible by the law of England, and under the law of England, is to say no more than that the law of England has not adopted the rule of legitimation *per subsequens matrimonium;* but if it be meant that because a child was born in England it cannot become legitimate in Scotland by a Scotch marriage, is a question to be determined by the law of Scotland, it is a *petitio principi* for which there is no authority whatever in that law. . . . . We are here in a Scotch question and in a Scotch court, applying a plain rule of our law, and unless that law says that if a child be born in England it shall not have the benefit of the rule, we do not see how it is at all material that it could not enjoy it if the law of England were to be applied to the case; but we know of no exception in the law of Scotland, nor, as far as we are informed, is there any such exception recognized in the law of any country which holds the principle of legitimation *per subsequens matrimonium*. We are not here giving any opinion on a point about which it does not belong to us to form any judgment. We are not inquiring what the law of England might decide if the pursuer, or any person similarly situated, were making a claim in an English court of law in respect of property within their jurisdiction. . . . . We are aware that conflicts of law may take place, and there is no help for it when they do occur; but the question before us is a purely Scotch question, to be ruled by general principles, no doubt, but still with reference to the law of Scotland in that particular point, and we cannot, in consistency with the established principles of that law, hold that this pursuer could not become legitimated by the marriage of her parents, when or wheresoever she may have been born. It appears to us to be very clear that the circumstance of the mother being *English* adds nothing at all to the supposed difficulty in the place of the pursuer's birth. She was certainly illegitimate by the law of England, and by the law of Scotland also, at the time of her birth, and she would have been so equally though her mother had been a Scotchwoman. Lord Mackenzie said: 'I cannot help entertaining doubt whether the indelibility of English bastardy has any meaning beyond this, that an English bastard is not legitimated by an English marriage. . . . . But suppose it were true that English bastardy is indelible, not only against a marriage in England, but against a marriage all the world over,—I say, suppose there was produced a statute providing and declaring that an English bastard born in England should remain a bastard all the world over, notwithstanding anything, that could be done in any country,—I ask, could we give it effect? Could we acknowledge the authority of such a statute? I think we will be bound to say that the English Parliament might rule the fate of the bastards in England, but that its laws were not entitled to extend to other countries, and that there was no principle of the law of nations which would give effect to such a statute.'" In summing up his conclusions, the Lord Chancellor, after holding Munro to be domiciled in Scotland, said: "If that be a correct conclusion from the evidence, it follows that the appellant in *Munro* v. *Munro*, being the child of a domiciled Scotchman, had at the moment of her birth a capacity of being legitimatized by the subsequent marriage of her parents for all civil purposes in Scotland, and that she, accordingly, by their subsequent marriage in 1801, became legitimated, and, as such, capable of succeeding to the property in question."

The foregoing views of learned judges are in direct conflict with the arguments of appellants' counsel in this case; and such views were declared to be the law, after able arguments there made upon the same lines as here presented. Appellants insist that the domicile of the child irrevocably fixes that child's *status*. In this case, subsequent to the child's birth, Julia Perry married a domiciled Englishman; hence her domicile was permanently established in England, and for that reason the child's domicile, being the mother's domicile, was permanently established there. Under appellants' reasoning, this state of facts would forever debar the child from legitimation, for even its presence in California would avail nothing as against its English domicile. If such be good law, section 226 of the Civil Code, expressly authorizing the adoption of minors of other states, is bad law, for it is squarely in conflict with those views.

We find in Story's work upon Conflict of Laws (sec. 105 a) the following: "6. As to issue born before the marriage, if by the law of the country where they are born they would be legitimated by the subsequent marriage of their parents, they will by such subsequent marriage (perhaps in any country, but at all events in the same country) become legitimate, so that this character of legitimacy will be recognized in every other country. If illegitimate there, the same character will belong to them in every other country." But Judge Story's citations in its support do not clearly bear him out, and legal authority to the effect that the place of birth forms no element in the case vastly preponderates.

We have in *Loring* v. *Thorndike*, 5 Allen, 257, a case involving additional elements, and therefore additional complications, even to those found in the Munro case. The man was domiciled in Massachusetts. The woman was domiciled in Mayence. The illegitimate children were born in Frankfort-on-the-Main, and the marriage occurred at that city. To accomplish legitimation, the Massachusetts law required not only a subsequent marriage, but a subsequent acknowledgement of the child. Upon this state of facts, and this provision of law, the child was held legitimate by the Massachusetts court, even though the acts of acknowledgment occurred in a foreign country. In the case of *In re Grove,* L. R. 40 Ch. Div. 216, Lord Chief Justice Cotton said: "What is really necessary, I think, is, that the father should at the time of the birth of the child be domiciled in the country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage; but it is the subsequent marriage which gives the legitimacy to the child, who has at its birth, in consequence of its father's domicile, the capacity of being made legitimate by a subsequent marriage." In the same case, Lord Justice Fry stated: "The appellant claims through Sarah Thomegay, who was born in 1744, in this country [England], and was an illegitimate child of Marc Thomegay and Martha Powis. At birth that child took the domicile of its mother, and it took the *status* of illegitimacy according to the law of the domicile of its mother, and it took also the capacity to change that *status* of illegitimacy for one of legitimacy, provided that, according to the law of the domicile of the father, the subsequent marriage would work legitimation. The position of such a child, therefore, is curious, taking domicile and *status* from the mother, but taking the potentiality of changing its *status* from its putative father." In the case of *Shedden* v. *Patrick,* 1 Macq. 535, the father being domiciled in the state of New York at the date of the child's birth, and there being no law of legitimation in New York, the child was declared illegitimate by the English courts.

Appellants' counsel confidently insist that *Ross* v. *Ross,* 129 Mass. 243, 37 Am. Rep. 321, is valuable as an authority to support their views. After a careful examination of the opinion in that case, we are unable to perceive its force as authority here. A child was legally adopted in Pennsylvania. The adoptive parent removed with the child to Massachusetts, where the father became domiciled, and there died, leaving real estate in that commonwealth. The litigation arose upon a question as to who was entitled to inherit, and the court said: "We are therefore of the opinion that the legal *status* of the child of intestate, once acquired by the demandant under a statute and by a judicial decree of the state of Pennsylvania, while the parties were domiciled there, continued after their removal into this commonwealth, and that by virtue thereof the demandant is entitled to maintain this action." Respondent's position in this case controverts no principle of law there declared, and it is difficult to see how the court could have arrived at a different conclusion. The judgment would have been the same if the father had never changed his domicile to Massachusetts, and probably the same if there had been no law of adoption whatever in that state. *Miller* v. *Miller,* 91 N. Y. 315, 43 Am. Rep. 669, in principle, seems to have been that character of case, and the same conclusions were there arrived at by the court. In the celebrated case of *Birtwhistle* v. *Vardill,* 2 Clark & F. 840, to which the learned chief justice refers in his opinion in the Ross case, the decision would have undoubtedly been in line with *Ross* v. *Ross,* 129 Mass. 243, 37 Am. Rep. 321, if, in lieu of the Statute of Merton, England's law of descent had been similar to the Massachusetts provision. The case of *Foster* v. *Waterman,* 124 Mass. 592, involves nothing but a single question of statutory construction, and in no manner supports the proposition that a resident of one state cannot adopt a child under the adoption laws of another state, where such child is domiciled, but *Appeal of Wolf,* 13 Atl. Rep. 760, does hold directly to the contrary of such contention.

The doctrine of indelibility of bastardy in England is not correct in its broadest sense, for it is in the power of Parliament to legitimate bastards at any time. Neither is the rule universal that a child legitimate in one country is legitimate in all the world. This principle of different *status* in different countries finds a striking illustration in Lolly's case, reviewed and dissented from by Lord Brougham in *Warrender* v. *Warrender,* 2 Clark & F.

539. In that case the facts disclose that Lolly was married in England, divorced in Scotland, and upon his return to England and making a second marriage, he was then tried and convicted of bigamy. Here we have a state of facts where, under the respective laws of England and Scotland, Lolly, after his divorce and prior to his second marriage, was a married man in England and an unmarried man in Scotland, and after his second marriage he had a lawful wife in Scotland and a different lawful wife in England, thus having two lawful wives at the same time. It can hardly be said that Lolly's *status* was the same in both countries. A similar principle is applied to the legitimacy of children by subsequent marriage. The provisions of section 215 would operate upon and legitimate a child born of a father who, at the time of its conception and birth, was the husband of another woman, or would apply to an incestuous bastard. Such was expressly declared to be the law under a similar provision of a state statute in the case of *Hawbecker* v. *Hawbecker,* 43 Md. 516, the court saying: "No doubt, the legislature, in thus mitigating the severe rule of the common law, intended to hold out to the sinning parents an inducement to marry, and thus put a stop to the mischiefs of further illicit intercourse between them, *but, in our opinion, the main purpose and intent of the enactment we are now considering was to remove the taint and disabilities of bastardy from the unoffending children whenever their parents did marry, without regard to the deepness of guilt on the part of their parents in which they were conceived and born.*" Such a child, under the canon law, would be deemed an adulterine or incestuous bastard, incapable of legitimation, and in the courts of certain countries where that law controls would not be recognized as legitimate. Thus is presented a case, and by no means an anomalous one, where the child would be legitimate in California, and illegitimate by the laws of various other countries. (See Fraser on Parent and Child, 56, subd. 10.)

We have quoted thus extensively from the authorities upon the subject of domicile as specially bearing upon the question of *legitimatii per subsequens matrimonium,* for the reason that we are unable to perceive any difference in the general principles of law bearing upon that character of legitimation and in those principles bearing upon other farms of legitimation authorized by the same statute. The only distinction claimed by appellants is, that legitimation founded upon subsequent marriage is based upon the fiction of law that a previous consent existed, and the marriage related back to that time. Upon this point it would seem all-sufficient to say that our statute does not recognize such a fiction, and its effective operation in no wise depends upon the assumption of its presence. Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions. In Birtwhistle v. Vardill, 2 Clark & F. 840, Tyndall, L. C. J., in speaking upon this question, says: "Pothier, on the other hand, when he speaks of the effect of a subsequent marriage in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes, and then adds . . . . that it is a common right, received throughout the whole kingdom." Schouler on Domestic Relations (sec. 226) says: "The principle to which the law of legislation *per subsequens matrimonium* is to be referred has been a subject of controversy. The canonists base the law, not on general views of expediency and justice, but upon a fiction which they adopted in order to reconcile the new law with established rules; for, assuming that, as a general rule, children are not legitimate unless born in lawful wedlock, they declared that by a fiction of law parents were married when the child was born. Such reasoning, by no means uncommon when the wise saw more clearly what was right than why it was so, has not stood the test of modern logic, and the Scotch courts have placed the rule once more where its imperial founders left it, namely, on the ground of general policy and justice"

Upon principle, no distinction can be made between the rules of law applicable to these various forms of legitimation. Many of the states of this Union, in order to effect those ends, require, in addition to a subsequent marriage, that the father (in some states both father and mother) shall also acknowledge the child.

This is the case of *Loring* v. *Thorndike,* 5 Allen, 257, where the marriage not only took place in foreign territory, but as is said in *Ross* v. *Ross,* 129 Mass. 259, the facts of the acknowledgment occurred in a foreign jurisdiction. Thus Massachusetts law required marriage *and* acknowledgment, and invoked the rule of domicile of the father to establish the capacity of the child for legitimation. Section 2405 of the Revised Code of Alabama allows legitimation of a bastard child simply by acknowledgment of the father in writing, certified and recorded. No consent of the mother is required; no notice to or consent of the child is demanded. If such a statute were found within the lids of the Civil Code of this state, under the facts of this case as they appear upon the question of domicile, Blythe, by following the requirements of the provision of law there laid down, could legitimate his illegitimate child. California law (Civ. Code, sec. 215) declares that marriage *ipso facto* results in legitimation, and section 230 declares that acknowledgment accompanied by certain other acts shall result in legitimation. If the principle of the domicile of the father is good law where marriage and acknowledgment are both required to accomplish the result, that principle is no less good law when applied to marriage alone under section 215, or when applied to acknowledgment alone under the Alabama Code, or when applied to acknowledgment accompanied by other acts under section 230 of the Civil Code of this state.

Dicey says (p. 192): "Question. What is the effect, according to English law, of a person being made legitimate by the authority of a foreign sovereign? Suppose that a person born illegitimate is legitimated by a decree of the Czar of Russia; will such a person be held legitimate here? There is no English authority on the subject. The most probable answer is (it is conceived), that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicile of such person's father at the time of the birth. *Suppose, that is to say, that D, the child's father, were domiciled in Russia at the time of the child's birth, the decree would have the effect of making the child legitimate in England.* A person, on the other hand, born of a father domiciled in England could not be made legitimate here by the force of any foreign law'.'

Bar, in his International Law, has discussed this identical question at length, although it can scarcely be said to be even incidentally mentioned in the works of either Savigny, Foote, Phillimore, or Schaffner. He says (sec. 198): "In what we have said we have proceeded on the footing that legitimation, if the consent of the child be validly given, is dependent solely on the personal law of the father, and that, therefore, if this law allows legitimation by an act of the head of the state, it matters not to inquire whether some other legal system, in particular the personal law which the child has hitherto enjoyed, recognizes this legitimation; but that, on the contrary, legitimation *per rescriptum* is to be regarded in international law on exactly the same footing as legitimation *per subsequens matrimonium*. This opinion, which, as we think, is the prevailing opinion in German jurisprudence, and in which, too, Fiore (sec. 149), Phillimore (sec. 542), and Wharton (sec. 249) concur, has, however, often been disputed. In the first place, it has been said that an act of that kind by a sovereign must necessarily have its operation confined to the dominions of that sovereign, for he has no authority beyond these limits; but if it be true, generally, that the personal law of the father is the rule, that law must be allowed to say that legitimation can take place by means of an act of that kind. The legitimation is to be recognized, not because the sovereign is to exercise sovereign rights in another country, but because the personal law is to have effect there. The opposite opinion, which is held by older writers, is no doubt explained, and to some extent justified, by the imperfect legal capacity which in the middle ages, and in many territories down to later times, clung to the bastard, especially, too, as the sole result of legitimation, even in the territory of the sovereign who bestowed it, was in many cases merely to withdraw the estate of the person so legitimated, upon his death, from the grasp of his sovereign, etc. . . . . But, in the second place, the more modern French school, while they reject the view of the older writers as to the effect of the legitimation being necessarily confined to the territory of the sovereign who bestows it, refuse to recognize this kind of legitimation, unless it is also recognized in the personal law which the child has hitherto enjoyed. In this way, one who has hitherto been a French child, in respect that the Civil Code has never sanctioned legitimation *per rescriptum,* can never be legitimated by the act of a foreign sovereign. But Laurent, in arguing in support of this doctrine that legitimation touches the *status* of persons, and that this *status* must be determined everywhere of Frenchmen by the law of France, proves too much. This rule would have to hold, also, in the cases of legitimation by subsequent marriage, so that in this case, also, the personal law of the child would be the only rule."

In this connection, and as bearing directly and emphatically upon the general principles involved in the solution of the important question presented by this branch of the case, we again quote from Bar (sec. 194): "If the personal law of the child requires more conditions to be observed before it will pronounce that a child has been legitimated, the reason of that is, not any anxiety for the interest of the child, so much as for that of the father and his family, e. g., the other children, his collateral relations; but the state, to which the child has up to that moment belonged, has no interest in that matter, and if that legal system which is charged with the protection of the family is willing to hold the child legitimated, there is in truth no conflict between the two systems. That system to which the child has hitherto belonged says: 'If the father belonged to me, I would not hold the child to be legitimated.' That involved no contradiction of the other system, which says: 'Since the father belongs to me, I do hold the child to be legitimated.' No doubt we must assume that assent of the child is given in due legal form, for legitimation can only take place against the child's wish if the personal law of the child forces that upon him or her; but in by far the greater number of cases it will be beyond all doubt that the legitimation is advantageous to the child, and the child or its guardian can subsequently signify its approval of and found upon it."

Legitimation is the creature of legislation. Its existence is solely dependent upon the law and policy of each particular sovereignty. The law and policy of this state authorize and encourage it, and there is no principle upon which California law and policy, when invoked in California courts, shall be made to surrender to the antagonistic law and policy of Great Britain. It was said in *Munro* v. *Munro,* 1 Rob. App. 492: "We are here in a Scotch question and in a Scotch court, applying a plain rule of our law, and unless that law says that if a chidl be born in England it shall not have the benefit of the rule, we do not see how that it is at all material that it could not enjoy it if the law of England were to be applied to the case"; and again: "We are not inquiring what the law of England might decide if the person were making a claim in an English court of law in respect of property within their jurisdiction." And we say here, plaintiff was the child of Blythe, who was a domiciled citizen of the state of California. She founds her claim upon the statutes of this state, and is now here invoking the jurisdiction of the courts of this state. It is a question of California law to be construed in California courts, and we see nothing in our constitution or statutory law, or in international law, to have prevented Blythe from making the plaintiff his daughter in every sense that the word implies. In conclusion, we hold that Blythe being domiciled in the state of California both at the time of the birth of plaintiff and at the time he performed the acts which it is claimed resulted in the legitimation of plaintiff, and California law authorizing the legitimation of bastards by the doing of certain acts, it follows that Florence Blythe, the plaintiff, at all times was possessed of a capacity for legitimation, under section 230 of the Civil Code of this state.

We pass to an examination of the second branch of the discussion involved in the consideration of section 230; namely, if plaintiff's situation endowed her with the capacity for legitimation, did the acts of Blythe bring her within the requirements of the statute? Those requirements are: 1. He shall publicly acknowledge the child as his own; 2. He shall receive it as his child, with the consent of his wife, if he is married, into his family; 3. He shall otherwise treat is as if it were a legitimate child.

As to these matters, the trial court found in detail the facts to be, that Blythe had fulfilled every requirement of the satute.

These findings are strenuously attacked as being unsupported by the evidence, and we are called upon to pass upon its sufficiency in this regard.

This section of the code is entitled to a liberal construction, because section 4 provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions . . . . are to be liberally construed, with a view to effect its objects and to promote justice." By virtue of this provision, the court, in the case of *In re Jessup,* 81 Cal. 419, has expressly declared that this section shall have a liberal construction, but, as there said, "liberal construction does not mean enlargement or restriction of a plain provision of a written law. If a provision of the code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its apparent object and promote justice."

Did Blythe acknowledge the plaintiff to be his own child? The word "acknowledge" has no technical meaning, and in its ordinary acceptation is defined, by Webster, "to own or admit the knowledge of." It is not necessary to dwell at great length upon this special element necessary to satisfy the statute. Under the evidence, it can hardly be considered debatable. Blythe declared the plaintiff to be his child, to all persons, upon all occasions. He was garrulous upon the subject. Aside from his business occupations, his mind ever rested upon his relations to the child, and it was his common topic of conversation. If necessary to this decision, it could almost be held that he shouted it from the housetops. He acknowledged the child to its mother and to its grandmother before it was born, and subsequently, in no single instance, was he ever heard to deny its paternity. It was named and baptized Florence Blythe at his request, and ever after has been known to the world as Florence Blythe. Authority is not necessary to be cited to support this branch of the case, but *In* *re Jessup*, 81 Cal. 419, is not only in accord with this position, but conclusive in its favor. This acknowledgment was also public, for, as we have seen, the thought of concealment of the paternity of the child never entered his mind. Why should it, when it is entirely apparent from the evidence that he was proud of such paternity?

2. Did Blythe receive it as his child, with the consent of his wife, into his family?. Blythe had no wife, and that element of the statute is eliminated from the case. No construction of the statute, however rigid, would hold the existence of a wife necessary, before the benefits to be derived under this section could possibly attach to an illegitimate child. This question of the wife's consent can only be a material element when there is a wife to consent. *In re Jessup*, 81 Cal. 419, fully recognizes and necessarily adopts this principle, for in that case, as here, the father of the child had no wife to consent, and such fact would thus have defeated plaintiff's claims at the very threshold of the litigation. It may be conceded, for the purposes of this case, that if Blythe had a family, such child must have been received therein, or the statute would not have been satisfied; but, as we have seen, if Blythe had no wife to consent, that requirement has no standing here; so if he had no family into which the child could have been received, that element is foreign to the case. Under the rule of liberal construction laid down in the case of *In re Jessup*, 81 Cal. 419, such must necessarily be the law. To give that meaning to the statute by which all men who have no families are debarred from legitimating their illegitimate offspring would be to give the section a harsh and illiberal construction. Unless the provision is so plain and explicit as to amount to an express inhibition to that effect, upon every principle of right and justice we could not so hold. The rule of construction as declared in the Jessup case is, that if the statute is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such construction is to be indulged as, within, the fair interpretation of its language, will effect its apparent object and purpose. Section 1866 of the Code of Civil Procedure further provides: "When a statute or instrument is equally susceptible of two interpretations,

one in favor of natural right, and the other against it, the former is to be adopted." Applying these tests of statutory construction to this provision, but one result can flow therefrom, and that is, the existence of a family, no more than the existence of a wife, is an indispensable element to a complete and perfect adoption (or legitimation, more properly speaking) under this provision of law. This view is fully borne out by the decision in *In re Jessup,* 81 Cal. 419. It is said in the decision of the court in that case, referring to Jessup: "As he had no home and no family in the strict sense of a 'collective body of persons who live in one house and under one head or manager, a household including parents, children, and servants,' it would not be a fair or liberal construction to say that the child had not been adopted or acknowledged because he had not been received in such a home or made a member of such family." It is needless to say that the Jessup case was considered with the care that its importance demanded, for the record discloses that fact; and it may be suggested that upon this question alone the court stood together. Indeed, the learned counsel representing appellants in that case throughout their arguments conceded such to be the law. Blythe had no family. The court found that he was living with a mistress in San Francisco from the year 1880 to the time of his death. He appears to have lived in lodging-houses during all these years. He had no relations, save of the collateral line, and they were at all times residing in a foreign country. He had not seen them or communicated with them for more than ten years prior to his death, and at no time had he seen any of them, or communicated with any of them, since Florence Blythe, the plaintiff, was born. If he had a family, either his mistress or these collateral kindred constituted that family. Such cannot be the fact, and it would be a travesty upon the word to so hold. It was held in the Jessup case that the father had a family, in the sense of brothers and sisters, with whom he was brought into frequent contact, and from whom he concealed and denied the paternity of the child, and for these reasons, and others, the court held there was no adoption. There are no facts in this case in the slightest degree comparable to those there presented. In that case, the language of the court as to this point bears directly upon the question of acknowledgment, and not as to the reception into the family; and we have already seen that a public acknowledgment was made by Blythe against which nothing can be said. If the term "receiving it into his family" does not necessarily mean an actual reception into an actual family, but may mean a constructive reception into a constructive family, then such measure of requirement is filled to the brim. Plaintiff was baptized in Blythe's name at his request. Their correspondence indicates hearts filled with mutual affection. Her picture looked down upon him from its place upon the wall. At his rooms her name was a household word.

We pass to the examination of the remaining element of the statute, to wit: "He shall otherwise treat it as a legitimate child." If the father has publicly acknowledged the child to be his child, and has taken it into his family, it would seem but little remained to be done to wash away forever the stain of bastardy. The public acknowledgment of the child is the main fact. It is the important factor, in the eyes of the statute. If the child was publicly acknowledged and received into the family, it would be a novel case where a court of equity would close its doors and refuse to declare a legitimation because the child was poorly clothed and illy fed. That case has not yet arisen, and it is hoped and believed it never will. The statute clearly means that the father must treat his illegitimate child as he would naturally treat his legitimate child, not as the majority of men in his financial circumstances would or should treat their children. Every man furnishes the rule by which he must be measured. No imaginary standard of excellence can be created, and then it be demanded that Blythe shall rise to that standard. If appellants' contention be true, a child whose father was an ignorant man believing education an evil to be shunned, and who therefore denied an education to the child, could not be granted legitimation. Upon appellants' theory, an illegitimate child whose father was a miser would be compelled to bear forever the stain of bastardy While Blythe was a man of large property interests, his estates were heavily involved. Money was required in many channels, and it is not probable that he had any surplus of cash on hand. Plaintiff was well clothed and well fed. It appears that at no time was she deprived of the necessaries of life. She resided at all times either with her mother or her grandfather. Blythe furnished something near $150 a year for her support; certainly during her infancy this was entirely sufficient, and no complaints were made to him that more money was needed to meet her wants. At all these times he himself was either stopping in a log house in the mountains of Trinity, or living with his mistress in lodgings in San Francisco, surrounded by his dogs, birds, and cats, while his hens were located upon the roof. It may well be inferred from the simplicity of his own life as indicated by the foregoing circumstances, that if legitimate children had been born to him, they would have been treated, as far as pecuniary expenditures were concerned, upon the same lines as this illegitimate child was treated. He made a will, which was subsequently lost or destroyed, wherein he provided for her. He corresponded with her as a father would correspond with his little daughter. He had her christened in the name of Florence Blythe. Her health, her education, and her religion were matters in which he exercised the utmost concern. She occupied his thoughts, and her name was upon his lips in his dying hour. For these reasons, it may well be said that "he otherwise treated her as a legitimate child."

We pass to an examination of section 1387 of the Civil Code, upon which plaintiff relies to constitute herself an heir of Thomas H. Blythe, deceased. That section declares, *inter alia,* that "every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." It is unnecessary to decide whether this provision affects the *status* of a child, or whether it is alone a statute of descent. If it either directly or indirectly touches upon *status,* our views upon the question, as herein previously expressed, are applicable. If it is a statute of descent, pure and simple,—and *Estate of Magee,* 63 Cal. 414, seems to so declare in explicit terms,—then the plaintiff is entitled to all the benefits of it, regardless of domicile, *status*, or extraterritorial operation of state laws.

The rules of liberal construction applicable to section 230 are likewise to be invoked in the consideration of section 1387; and the obvious purpose and intent of the legislature in making this enactment was to entitle illegitimate children to inherit their father's estate, the same as legitimate children. Did the intestate, Blythe, in writing, signed in the presence of a competent witness, acknowledge that he was the father of the claimant, Florence Blythe? Upon an inspection of the provision, we see that the word "acknowledge" must be viewed in the light of its ordinary acceptation, and it is therefore used in exactly the same sense as when found in section 230. The acts required to constitute the acknowledgment are not laid down in the statute. No stated form of acknowledgment is there found by which we may be guided. Again, we must take this statute as we find it. We are not here to construct a statute, but to construe a statute. We can neither interpolate nor eliminate, and we are bound to assume that the legislature enacted the law as it now stands with a due comprehension of the meaning of words and of the rules of statutory construction, and that they incorporated into the act all that was intended, and that they intended that effect should be given to all that was found therein.

The writings relied upon in this case to bring plaintiff within the provisions of the statute are various letters, written at different times, by Blythe to his daughter and her grandfather, which letters were signed by him in the presence of W. H. H. Hart, who was a competent witness. These letters, as to the question of acknowledgment of relationship, are of the same general character and import, and our investigation will be limited to the consideration of two of them, one a letter to the grandfather and the other a letter to the daughter, either of which, to our minds, fully satisfies the statute. He writes a letter to the plaintiff, from which we quote:—

"*My Darling Child,*—You have made your father very happy by writing to him your little letter. . . . . But I feel sad to learn that my own dear child has been sick, and her papa not being near to help her. You say you wonder when you shall see your dear papa. Well, my dear child, it is about like this: Your papa . . . .

After that your papa will leave San Francisco, ... and have his dear Florence with him always. . . . . I should like my dear daughter to write to her papa a letter once every month. . . . . Grant is now laying at my feet, while his master is writing his first letter to his own darling child, far away. . . . . May God bless you, my dear child. From your loving father,

"THOMAS H. BLYTHE."

The letter to the grandfather was read to said Hart, and signed in his presence. We quote: "I look at the proposed baptism of dear Flora as a matter of very deep importance. After full deliberation, I think it best to have Flora brought up in the Episcopal Church,—Church of England. You will, therefore, please have my daughter christened at once, and have her named after her father, Florence Blythe."

There can be but one construction placed upon these letters, and that is, they mean that Florence was the daughter of Thomas H. Blythe,—"his own dear child." These letters acknowledge the relationship of father and daughter, not hesitatingly and grudgingly, but willingly, gladly, and entirely. When a father says, "You are my own darling child," "I am your father; you shall be baptized in my name, and loved, cherished, and protected always," the subject is exhausted, the cup of acknowledgment is filled to overflowing. If letters are entitled to be used as writings to prove the fact of acknowledgment, these letters prove that fact. It was decided in *Bailey* v. *Boyd,* 59 Ind. 297, under a statute requiring the father to acknowledge his illegitimate child subsequent to marriage, before such child should be held legitimate, that "it was not necessary that this acknowledgment should have been expressed in words, but it may fairly be inferred from the acts and conduct of the elder Bazil." But it is now insisted that the writing must be a writing specially prepared for the sole object of making the illegitimate child an heir of the father. The adjudications of courts are not favorable to this view. In the case of *Rice* v. *Efford,* 3 Hen. & M. 227, it was held that the recognition of the illegitimate child in a will as the testator's child, the will being void as a will, was sufficient to entitle him to inherit. Chief Justice Tucker, in this connection, saying in *Stones* v.

Keeling, reported in the same volume, upon the following page: "The act of 1785, it should be remembered, relates to the disposition of property only, and proceeds to show who shall be admitted to share the property of a person dying intestate, notwithstanding any former legal bar to a succession thereto, and in that light the law ought to receive the most liberal construction, it being evidently the design of the legislature to establish the most liberal and extensive rules of succession to estates in favor of all in whose favor the intestate himself, had he made a will, might have been supposed to be influenced, and here there can be no doubt, had he died testate, that these daughters would have been the first object of his care." Reading the present case in the light of the evidence furnished by the record, there can be no doubt but if Blythe had died testate, Florence would have been the first object of his care. In *Succession of Fletcher*, 11 La. Ann. 60, Henry Fletcher, in an act of manumission made before a notary and witnesses, described the party enfranchised by his act as his "natural daughter, slave," and such was held to be a sufficient acknowledgment of paternity, under a statute which declared that "the acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses." In that case the court, citing French authorities, held: "It is said that the words 'natural daughter, slave,' were terms of description foreign to the purpose of the act, used to manumit a slave, and not to acknowledge her paternity, but no form is prescribed for such an acknowledgment, save only that the declaration be made before a notary public, in presence of two witnesses. If the declaration be thus made, it seems to be immaterial whether it be the main object of the act, or not." In *Remy v. Municipality*, 11 La. Ann. 159, the court, in referring to the acknowledgment of paternity made in a will, said: "This document, it is true, was intended to be a will, and has never been admitted to probate as such, but though not binding as a will, it is certainly good as an acknowledgment of paternity, made in due form." Section 1387 is essentially a statute of inheritance, and there is no more fitting place for the father to recognize the moral duty enjoined upon him toward his illegitimate offspring than by acknowledging that child in his last will and testament in accordance with the provisions of that section; and the fact that the acknowledgment was subsidiary to the main object and purpose of the testator in making the document would not thereby weaken the effect of the writing as an acknowledgment.

Under the statute of Indiana, marriage and subsequent acknowledgment of the paternity of the child by the father constituted a legitimation of the child, and in the case of *Brock* v. *State,* 85 Ind. 397, where the father married the woman and acknowledged the child for the sole purpose of escaping a prosecution for bastardy, and with the intention at the time of the marriage to immediately abandon the mother and child, it was held that such intentions were entirely immaterial, and that his acts created a legitimation.

In *Crane* v. *Crane,* 31 Iowa, 296, the question here involved squarely presented itself. The statute of Iowa provided for legitimation by a recognition in writing of the illegitimate child by the father. Two propositions upon which appellants insist are directly decided against them in that case. It was held that a formal writing of recognition was not necessary, but that letters to a friend would suffice, and it was further held that the references to the child in the letters were sufficient to constitute recognition. The references by the father in those letters to the child as his child, while quite clear, are weak, vague, and unconvincing when compared to the references upon the same subject found in the letters of Blythe. A majority of the states of this Union, and also various countries of Europe, require the illegitimate child to be recognized or acknowledged by the father before legitimation takes place, yet no authority has been cited from any state or country (and we therefore confidently assume there is none), except the case of *Pina* v. *Peck,* 31 Cal. 359, to which our attention shall be presently directed, which holds that a formal recognition or formal acknowledgment is necessary, in order to constitute a legitimation.

It is insisted that the witness Hart should have subscribed his name to the writing as a witness thereto, but "competent witness" and "subscribing" or "attesting" witness are in no sense synonymous terms. In *In the matter of Noble,* 124 Ill. 270, the court says: " 'Credible witnesses,' as used in the statute relating to wills, has been construed, both in England and this country, to mean *competent witnesses;* that is, such persons as are not legally disqualified from testifying in courts of justice by reason of mental incapacity, interest, or the commission of crime, or other cause excluding them from testifying generally, or rendering them incompetent in respect of the particular subject-matter or in the particular suit." As before remarked, it is not the duty of the court to add to or subtract from the words of the statute. We must construe it as it stands enacted. If the legislature had intended such witness to be a "subscribing" or "attesting" witness, it was easy for it to have said so. Not having so declared, it would be judicial legislation for this court to so hold the statute to be. Section 1940 of the Code of Civil Procedure provides that a writing may be proved by any one who saw it executed, and we cannot say but that such proof was contemplated by the legislature when it framed this provision of the statute. Our codes contain many instances where the term "attesting witness" or "subscribing witness' is used, when the signature of the witness is required to give life to a written instrument, and we must presume that the legislature did not intend that the writing should be signed, when it did not so declare. In all the statutes of the various states, wherever the signature of a witness to any document is required, we find the statute either using the words "attesting witness" or "subscribing witness." Under the liberal rules of construction by which this court must be guided, and under the principle laid down by Chief Justice Tucker in *Stones* v. *Keeling,* 3 Hen. & M. 228, we are not called upon to defeat this plaintiff's claims by holding that the words "competent witness," as used in the statute, should be construed to mean "attesting" or "subscribing" witness. The law of Pennsylvania requires that the will of a married woman shall be executed in the presence of two witnesses, and the court said, in *Combs's Appeal,* 105 Pa. St. 159: "Such witnesses were not required to subscribe their names thereto." If more need be said on this behalf, we would suggest that this statute was originally copied from a statute of the state of

Maine, which also used the words "competent witness"; but subsequently the legislature of that state amended the statute by causing it to read, *"and attested by a* competent witness," that legislature thus recognizing not only the fact that legislation was necessary in order that the witness should be required to sign the writing, but also that it was a matter with which the legislature should deal and with which the courts had no concern. It is a familiar principle of statutory construction that a statute, taken and enacted from the laws of another state carries with it the construction given to it by the laws of that state. The amendment made to the statute of Maine clearly indicates what construction was there given this provision of section 1387.

In speaking as to the construction of statutes relating to the form and manner of making wills, the court said in *In the Matter of Simpson,* 56 How. Pr. 126: "The restrictions which from motives of prudence are thrown around the right should be construed liberally in favor of the testament, and forms should not be required which the legislature has not plainly prescribed." The question as to the wisdom and policy of this provision is not a matter for our consideration. This court is not the forum to administer relief for evil in this law, if evil there be. If the law is not what it should be, let the legislature follow the course adopted by the state from which it took the law, and amend the statute in this regard, as that state has done. As the law is now written, compliance has been had with it, and having determined that matter, the investigation is concluded, as far as this court is concerned.

It is further insisted that the letters, when placed in the crucible by which they are to be tested, are found wanting, because it is said that the writing must be complete in itself; that is, it must show upon its face that the child is an illegitimate child, and that it was signed in the presence of a competent witness. We find nothing in the law subjecting the writing to any such test. The statute does not require it. Such recitals would not add one jot to the weight and credit to be given to the writing by the court, if they were there found stated. They would have no more weight and be of no more avail in arriving at a final determination of the merits of the cause, than if Blythe had said in the writing, "I made this writing, and the facts therein stated are true." A statement in the writing that it was signed in the presence of a competent witness could not be evidence of that fact; no more would a reference in the writing to the child as an illegitimate child establish such illegitimacy. In *Grant* v. *Mitchell,* 83 Me. 26, the court, in speaking to this question, said: "In either case, it must first appear that the child is illegitimate. The statute does not, nor does it purport to, act upon any other; nor does the subsequent marriage, adoption, or acknowledgment have any tendency to prove this fact. Whatever may be the effect of the acknowledgment in showing the paternity of one proved to be illegitimate, it cannot be taken as proof of the illegitimacy." Blythe, in writing, acknowledged himself to be the father of Florence Blythe; Florence Blythe is an illegitimate child; therefore, Blythe acknowledged himself to be the father of an illegitimate child. This logic is unassailable, and no sound reason can be adduced why the acknowledgment should contain a declaration of bastardy.

Bearing upon both branches of this case, as to the policy of the law, and the true principle of construction to be invoked, we quote the apt language of Beatty, C. J., in the Jessup case (81 Cal. 435), and the views there expressed in no wise conflict with the principles declared in the main opinion of the court. He says: "The only argument that can be made against his claim to inherit his father's estate rests upon a strict construction of the statutes, remedial in their nature, designed to secure to innocent unfortunates in his situation a just share of the rights to which they are by nature as fully entitled as are legitimate offspring. No doubt a strong argument can be built on this basis of strict construction against the decision of the superior court. But I adhere to the view so strongly put and so satisfactorily maintained by Justice Works in his opinion, that in cases of this kind the only strictness required is in proof of paternity. That being satisfactorily established by plenary proof, I think courts should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest and humane man should be not only willing but eager to do, and what a just law would compel the unwilling to do. I also think it a wholly unauthorized construction of the statute to hold that the acts of recognition, acknowledgment, etc., necessary to legitimize a natural child should be performed with the express intention on the part of the father of accomplishing that object. If the acts are in themselves such as the statute prescribes, I think they confer legitimacy without any reference to the intent with which they are performed. There is no danger to morality in recognizing the natural rights of illegitimate children as against their fathers, or other claimants of their estates, and there is no danger of encouraging the fabrication of spurious claims so long as strict proof of paternity is insisted upon."

The foregoing views are not in harmony with the principles declared in the elaborate opinion of Mr. Justice Rhodes in the case of *Pina* v. *Peck,* 31 Cal. 359, and upon which decision appellants in the main rest this branch of their case. It is not our intention to analyze the soundness of the legal principles there laid down, otherwise than may have been incidentally done in what we have already said. Still, we might be allowed to say, no authority of courts or men learned in the law is presented in that opinion to support the views there declared, although, as we have seen, authority is not wanting to the contrary. *Pina* v. *Peck,* 31 Cal. 359, is not authority in this case, for two sufficient reasons: 1. But four justices participated in the decision (Justice Sanderson not taking part), and two of these justices concurred alone in the judgment. This fact entirely destroys the effect of the decision as an authority upon any and all matters therein discussed. 2. Justice Rhodes says at the very inception of his opinion: "It is contended by the defendants that this provision of the statute is in derogation of the common law, and must, therefore, be strictly construed. That doctrine was announced and applied by the court in the estate of Samuel Sanford, and we are of opinion that the ruling is correct, beyond a doubt. *As a consequence resulting from the operation of this rule,* the acknowledgment must conform to the statute, and be complete in itself; that is to say, it must not require the aid of extrinsic evidence. When the parties are identified, and the instrument in writing is produced and proven, the court must be able to say from the instrument that the person who signed it thereby acknowledged himself to be the father of the illegitimate child therein named." Thus this decision was expressly based upon strict and rigid rules of statutory construction, and as we have seen, those rules of construction have now been entirely displaced, as to the codes, by rules liberal and humane in their character. That decision being expressly based upon strict rules of construction, and strict rules of construction now being abolished, it cannot be said to be binding authority in a case which we are called upon to decide by an application of statutory rules of liberal construction. It is insisted that the following rule of construction, as declared by Judge Cooley in his Constitutional Limitations (p. 66), must be invoked in this case, to wit: "It has ever properly been held that the legislature, by enacting without material alteration a statute which has been judicially expounded by the highest court of the state, must be presumed to have intended that the same words should be received in the new statute in the sense which had been attributed to them in the old." There can be no question that if the rules of statutory construction were the same now as when *Pina* v. *Peck*, 31 Cal. 359, was decided, and the views there expressed had been adopted by a majority of the court, this principle of the construction of statutes would have controlling effect in this case, but it is equally true that if the rules of construction have been changed, such principle, in the very nature of things, could not maintain.

For the foregoing reasons, let the judgment be affirmed.

PATERSON, J., and SHARPSTEIN, J., concurred.

GUARDIANS.

IN RE WILLIE RICE, 42 MICH., 528, (1880).

HABEAS CORPUS. Submitted Jan. 20. Denied Jan. 21.

Conely & Lucking for petitioner. An unauthorized appointment of a guardian by the probate court is absolutely void, and may be attacked collaterally or by motion to vacate, *Sears v. Terry,* 26 Conn., 273; *Dorman v. Ogbourne,* 16 Ala., 759; *Lacy v. William,* 27 Mo., 280; *Herring v. Goodson,* 43 Miss., 392; *Townsend v. Kendall,* 4 Minn., 412; *Wright v. Wright,* 24 Mich., 180; *People v. Dawell,* 25 Mich., 247; comity, if not absolute right, requires that the foreign guardian have the child. Wharton's Confl. Laws, §§ 259, 263; 3 Redf. Wills, 448, 450; Schouler's Dom. Rel., 443; *Woodworth v. Spring,* 4 Allen, 321; *Nugent v. Vetzera,* L. R. 2 Eq., 704; the right of the domiciliary guardian of an infant of tender age is as nearly absolute as is that of a parent, and should prevail, except in those cases of abuse or misconduct where, under similar circumstances, the right of a father would be interfered with, *Di Savini v. Lonsada,* 18 W. R., 425; *Townsend v. Kendall,* 4 Minn., 419; Wharton's Confl. Laws, §§ 262-263; a man's domicile continues till a new one is acquired, *Neff v. Neff,* 1 Binn., 351; Fisher's Dig., tit. Domicile, col., 9444; *Gilman v. Gilman,* 52 Me., 165; Phillimore on Domicile, 21; the doctrine that where one dies in journeying towards an intended domicile, he loses the old domicile, is not at all sustained by the facts of the case in which the doctrine had its origin, *Munroe v. Douglas,* 5 Maddock, 246; and is severely criticised in the following: *Harvard College v. Gore,* 5 Pick., 374, 375; *Somerville v. Somerville,* 5 Vesey, 786-7; *Munro v. Munro,* 7 Cl. & F., 876; *Bell., v. Kennedy,* 1 L. R. Scotch & Div. App., 307; actual presence within the territory is essential to the acquisition of a new domicile, *Sears v. Boston,* 1 Met., 250; *Abington v. North Bridgewater,* 23 Pick., 170; *Thorndike v. Boston,* 1 Met., 242; in a suit for divorce under a statute requiring the complainant to be a resident of Massachusetts at the time the cause of divorce occurred, it was held that where the parties left Massachusetts to remove to Colorado, and stopped four months in Philadelphia on the way, at which place the cause of divorce occurred, that the complainant was domiciled in Massachusetts, *Shaw v. Shaw,* 98 Mass., 158; the domicile of an infant is that of its father, and an infant cannot of its own motion change its domicile, Schouler's Dom. Relations, 412; *School Directors v. James,* 2 W. & S., 570.

T. A. Wilson and *Austin Blair* against the petition.

CAMPBELL, J. A *habeas corpus* was issued in this case on behalf of a Pennsylvania guardian to obtain possession of the infant over whom a guardian had been appointed by the probate court of Jackson county before any appointment was made in Pennsylvania.

The parents of the child, having formerly lived in Philadelphia, determined to change their residence and left that city with their son to go to Kansas to reside. They were both killed and the child injured by a railroad collision at Jackson last October. The boy, who is but three years old, was cared for at that city until an aunt, Mary C. Rogers, his mother's sister, came on and has since taken care of him, and was in December last appointed guardian. Afterwards an uncle in Philadelphia applied to the Orphan's Court, and a corporation, which is apparently created for trust purposes, was made guardian of the estate, and an aunt, his father's sister, Mrs. Ellen Taney, appointed guardian of the person.

Our laws usually contemplate the appointment of a guardian who has custody of the estate, whoever may have the custody of the person, and provide for no corporation guardianships.

All of the infant's property is now in Michigan, and his chief interest is supposed to be such compensation as may be obtained for his own injuries and the death of his parents.

Our laws contemplate that guardians may be appointed for infants, whatever may be their residence, who have property in this State, and do not recognize any absolute right in foreign guardians to be recognized. Whatever respect is paid them springs from comity and not from law, and is therefore not a matter of right.

If an infant, after having a guardian appointed at his domicile, where he has been in that guardian's personal custody, should be taken or found elsewhere, great respect should be paid to the claims of such guardian, which would probably in most cases be considered as paramount.

But where, on the other hand, the foreign appointment secures no control over the infant's estate, and has been created in a jurisdiction from which he was personally absent, the case is materially different.

It may or may not be that Philadelphia is to be regarded in law as technically the domicile of the parents and infant, inasmuch as they were still on the road to another, and had not reached it. Upon this we express no opinion, and assume that it may be. But for purposes of comity, the domicile is chiefly respected because it is in fact the home; and where there has been a departure with no design of returning, the legal character of the old domicile does not make it so controlling in matters of policy as it would be under other circumstances, although for other matters it may possibly control.

In the present case there can be no doubt that the Jackson probate court had power to appoint the guardian, and the infant's interests are also chiefly here, which made it a very proper thing to make some appointment here, whatever might be done elsewhere. The Michigan guardian is as near a relative as any other living relative, and the Pennsylvania guardian has not as full powers. There is nothing in the case which indicates that the latter should be preferred, and we do not feel that there is any duty imposed upon us, under the circumstances, of changing the custody.

The other Justices concurred.

IN RE STOCKMAN, 71 MICH. 180, (1888).

SHERWOOD, C. J. Lucile Stockman is now nine years of age, and resides with her maternal grandparents in Port Huron, who are her guardians in this State, having received their appointment as such on October 19, 1885. The *paternal* grandparents reside in Washington, D. C., and were duly appointed testamentary guardians for Lucile in that city on September 4, 1885. The child's father and mother are both dead. The testamentary guardians are the petitioners in this case, and they seek to recover by the writ of *habeas corpus* this infant girl from the Michigan guardians. Mrs. Stockman, the mother of Lucile, died in the city of Washington on November 24, 1879, and Hugh R. Stockman, the father, died in the same city on August 23, 1885.

These parents were married in April, 1877, at Port Huron, Mrs. Stockman being only about 16 years of age when married. They remained in Port Huron until some time in July, 1877. There were some unpleasant things occurred in the manner the husband brought about the marriage, and it only need be said they were of a character not calculated to greatly increase the estimate which would most likely be accorded to him by a well-ordered and virtuous community. The wife's parents were a well-to-do and respectable family, who had resided in Port Huron more than 20 years, reputable people in good standing. While in Port Huron the newly-married couple boarded at the Huron House, and Mrs. Stockman was allowed to visit her mother but once, and then for the purpose of getting her trunk before they left the city, and the mother never saw Mrs. Stockman again but once until a few hours before she died. They lived during their marriage in Georgia and in Washington.

After the birth of the child, Lucile, which occurred while they were in Georgia, the mother was allowed to come to Port Huron for a few weeks in July and August, 1879, and then returned to Washington, where she died. Her mother was telegraphed to go to Washington about 48 hours before Mrs. Stockman died, and she was permitted to have the company of Mrs. Shaw, her mother, about 24 hours before she passed away. Before she died, Mrs. Stockman asked her husband to allow her mother, Mrs. Shaw, to take Lucile and keep her, and Mr. Stockman promised her that he would do so. And after the funeral he told Mrs. Shaw of the request his wife had made, and the promise he gave her, and then and there urged Mrs. Shaw to take the child, and do as his wife requested; and upon her suggestion that she would be willing to take her, and bring her up, but was afraid he might afterwards change his mind, and take the child from her, he affirmed he would not, saying:

"Oh no, mother. You may have no fear. You take the child and bring her up pure and virtuous, like her mother, and that is all I ask."

Mrs. Shaw then promised him she would take her as requested by her daughter and him, and bring up the child as one of her own.

Mr. Stockman seemed very poor at this time. The only home he had ever furnished for his wife and child was in the family of his father and mother, and at their house; and after paying sundry bills for medicine for Mrs. Stockman before she died, and lending him $50 to help pay his wife's funeral expenses, she took the child Lucile, and brought her to her home in Port Huron, where she and her husband have cared for, supported, maintained, and educated her ever since.

When Mrs. Shaw took the child she was about 17 months old, and, the evidence shows, poor and sickly. She is now healthy, and enjoying her home and the family of her grandparents, where there are several children associates. She is also receiving such Christian education and other advantages as a large and prosperous Michigan city affords; and the testimony is to the effect that she desires to remain with her grandparents in Michigan, where she is contented and happy, and does not want to go and live with her paternal grandparents in Washington, and the maternal grandparents are anxious to have her remain with them, and are willing to maintain, educate, and support her from their own means, and at their own expense.

In the month of August, 1882, and after the child had been at Port Huron about 3 years, Mr. Stockman visited his daughter at Mr. and Mrs. Shaw's, and, after being there a few days, said he wanted to take her to Washington with him to spend the winter, and Mrs. Shaw could have her again in the spring, and was allowed to take her under his promise that the grandmother could have her again in the spring. Mrs. Shaw went for her in the month of April, 1883, when Mr. Stockman made trouble in getting her, and finally would not allow Mrs. Shaw to bring her away unless she would sign a writing, agreeing to return the child to him whenever he should call for her. Lucile was at the time not well, and these conditions, demanded of Mrs. Shaw before she could gain possession of the child, greatly embarrassed her, and, feeling that she could not leave her in Washington, she signed an instrument purporting to be of the effect stated. She then took the little girl, and returned to Port Huron with her. Mrs. Shaw avers that she was compelled to sign said written agreement before she could get away the child, who was then sick, and, fearing she might die if allowed to remain there, she was ready to do almost anything to get her away, and she was thus compelled, at the risk, as she believes, of the life of the child, and against her will, to sign said written instrument.

After their return to Port Huron, Lucile soon recovered her health, and she was permitted to remain undisturbed with Mrs. Shaw until on or about September 18, 1883, when Mr. Stockman came to the house of Mrs. Shaw, in Port Huron, and unceremoniously took the child away with the avowed purpose of taking her to Washington. This he was not allowed to do by Mr. Shaw, who found him with the child in the city, making preparation to leave with her. Shaw took her from Mr. Stockman, and went home with her. Mr. Stockman thereupon applied to the circuit court for the county of St. Clair for a writ of *habeas corpus* to recover his child. Mr. and Mrs. Shaw appeared, and filed their answer, contesting his right to Lucile upon the following grounds:

1. That by reason of the request of the dying mother, and consummated after her death by the agreement of Mr. Stockman with Mrs. Shaw, that she should have the care and custody of the child during her infancy, she was entitled to take her away.

2. That Mr. Stockman was an unfit person to have the care, companionship, custody, or education of the child; that he was intemperate in his habits; habitually used intoxicating liquor; that he had an ungovernable temper, and could not control his passions, and was a man of improper and immoral habits.

3. That he was extremely cross and cruel in his conduct towards Lucile, and without any sufficient cause would frequently inflict upon her severe blows, and cruel and improper punishment.

4. That he improperly treated the child when sick; compelled and forced her to take medicine of his own preparation, and contrary to the advice of physicians.

5. That he held improper relations and intercourse with bad women, and allowed them in his own rooms, in the presence of Lucile; and that he is financially unable to support the child; that he had no home of his own, was out of health, and was out of business.

The circuit judge ordered the case tried before a jury, and upon the first trial the jury disagreed, and upon the second trial, which occurred about a month thereafter, the jury rendered a verdict that Mr. and Mrs. Shaw should retain the custody of the child. This verdict was afterwards sought to be set aside in the circuit court, but the motion was denied by the circuit judge on May 27, 1884.

On June 23, 1884, Mr. Stockman filed his petition in this Court, and obtained a writ of *habeas corpus* to obtain his daughter. The application was substantially upon the same grounds as had been urged in the circuit court, and was heard upon the same testimony, with some unimportant additions, in this Court on October 18, 1884. The Court, being equally divided in opinion as to what should be done in the premises, caused to be entered the following order on January 30, 1885:

"In this case, the Court being equally divided in opinion as to the judgment that should be entered, the clerk is directed to make an entry to that effect, and the writ is dismissed for that cause, and without any decision upon the rights of the parties, and without prejudice either to any existing right or adjudication, or to any future remedy."

Here the matter was allowed to rest until Mr. Stockman died, in August, 1885. Previous to his death, which occurred at his father's in the city of Washington, and on February 20, 1885, he made a last will, in which he appointed his father and mother guardians of Lucile. They qualified, and letters of testamentary guardianship were duly issued to them in the orphans' court of the District of Columbia on September 4, 1885. In and by the will the testator directs his guardians to obtain the legal control of

Lucile, and, if necessary to that end, they are directed to use all his property; and if they do not succeed, then he gives his property to his father and mother, if living, and, if not, he gives it in equal shares to his brother and sisters, and recites in his will that Mr. and Mrs. Shaw had committed perjury in their endeavors to retain the child.

In pursuance of and in accordance with the requirements of this will, Mr. Andrew H. Stockman and Anna B. Stockman, his wife, the father and mother of the testator, applied for and obtained a writ of *habeas corpus* from this Court to obtain the custody of their testamentary ward, Lucile, on February 8, 1887.

The petition for the writ does not vary materially in its statement of the facts from those contained in the other application, except, in addition thereto, it states that Mr. and Mrs. Shaw refused to deliver up Lucile to the testamentary guardians when requested; and that at the time the testator died a large sum of money was due him for military service, and which now belongs to Lucile; and that he had some personal property besides, all of which the testamentary guardians had secured and then had; and that, under the decision of the pension office, all of the pension moneys to which Lucile is entitled on account of the service of her father are now being paid to the testamentary guardians; that such pension money and personal estate are sufficient to support the ward; and, further, that they are able, and have property enough, to support her, if necessary, aside from the pension money; and that the respondents, Mr. and Mrs. Shaw, have changed the name of Lucile from Stockman to Shaw, for the purpose of preventing identification, and have had her christened by that name.

The respondents file their answer to the petition, which is in substance the same as that made to the other writs issued, with the further statements that the said Anna B. Stockman allowed the deceased in his life-time to live and cohabit at her house with a harlot. They deny that they have changed, or attempted to change, the name of the child, and aver that they are Lucile's duly-appointed guardians in thisState. The answer then proceeds as follows:

"These respondents further state, the said Francis H. Shaw upon information and belief, and the said Marietta H. Shaw from her knowledge acquired as aforesaid, that the petitioners are unfit persons to have the care and custody of the little girl Lucile Stockman, and that by reason of the great change that would take place in her mode of living, and by reason of the great cruelty which would be practiced towards the said infant by the said Anna B. Stockman, they fear that her life would be in danger, and that she would live but a short time; and upon information and belief they state that the said petitioners are persons without any moral restraint whatever; and that in matters of religion they are without any attachment to any Christian or moral community whatever; and that their surroundings and education would taint and destroy the good moral character of said infant Lucile; and they ask the protection of this Court for such child; and that the facts and circumstances of the petition, and this answer, may be inquired into; and that by the judgment of this Court the prayer of the petitioners may be denied.

"These respondents further state, upon information and belief, that the only object and purpose which the petitioners have in obtaining the custody of said child is to enable them to have some pretext for expending whatever money the said infant may be entitled to under the provisions of the act of Congress of the United States and under the provisions of the will, as set forth in said petition; and they state ,upon information and belief, that there is no adequate security filed in any court in Washington to protect the estate of said infant from loss or speculation in case her custody and control should be transferred to the petitioners; and they refer to the affidavit hereto attached as a part of this answer."

The respondents also submit all the testimony upon the former trial, when the matter was before the jury. Such is substantially the issue as made up before us now for consideration.

The superior rights of a father to his child to those of the grandparents, all things else being equal, are no longer before us. It has now come to the single question and consideration whether the paternal or maternal grandparents shall have the care and custody. So far as the desires of the parents are concerned, the father's last wish was that his parents might have such care, and, so far as the mother's feeling in the matter is concerned, it was her dying request that her parents might have the care and training of her infant daughter, and at that time such were his wishes in the matter. I have reviewed all the evidence in this case, and, after applying to it all the knowledge and experience I possess, I must say that at this time, when he was stirred up by all the feelings of his better nature, and they had so far got control of his passions and prejudices as to allow his reason, his judgment, and affections to dictate what, under all the circumstances, would be best for the future welfare of his little child, in his wishes then expressed and the promise he gave to his dying wife, and the request he made of her mother that she would—

"Take the child and bring her up pure and virtuous, like her mother," saying, "That is all I ask,"—

He gave expression to the true sentiments of his heart, approved by his reason and his judgment; and it was the wisest and best conclusion he could have possibly reached, and in my opinion it ought not now to be disturbed.

The child is a girl. That mother knew better than any one else of its care and many wants and requirements through the period of its infancy and childhood, during a motherless future, and she knew that no one else could have the patience and affection for the little one, and minister to those wants, to the extent of her own mother. Others might be found to take the charge, but none could do it so well. There is no question but that Mrs. Shaw and her husband are competent, able, and well qualified for the duties the guardianship of this granddaughter imposes upon them, and it is a pleasure to them to discharge that duty. The child likes them, and is contended and happy with them. Why should this Court send her to a home where she does not wish to go, to friends she does not know, who have never expressed a desire for her, save to gratify the spleen and prejudice of a father, who by his will left to his daughter as her principal legacy the hatred he bore towards her mother's parents, to a climate not congenial to her health, and which brought her mother to a premature grave?

It is claimed by counsel for the Stockmans that the law is inexorable, and requires this to be done. I cannot agree with counsel upon this subject. Courts have a general superintending power over all infants, and the primary guardianship of the parent over his child lasts no longer than he is found to be competent, and discharges his duty which nature has laid upon him, properly; and when he fails to do this, the proper court may interfere, and charge another with the discharge of this duty. The good of society and the welfare of the State require this, and can never require less. Primarily, the court is the guardian of all orphan children, and will give the proper directions as to their care and support until such time as a guardian shall be appointed; and it is then its duty to see to it that the duties of the trust are properly discharged.

Guardians for infants may be appointed by the last will of the parent instead of by the court, in which case the court will recognize their authority and their control of the ward so long as it is right and proper, and for the best interest of the ward. The powers of a testamentary guardian are just the same precisely as are those of a guardian appointed by the court, and are allowed to be exercised or withheld for the same reasons. Who shall or may be appointed guardian is within the discretion of the court. Relatives of the infant are usually selected, and those nearest of kin are usually preferred when otherwise competent, and as between those entitled the question to be determined in making the selection is, and always should be, what will be for the best interest of the ward under all the circumstances? It should control everything else.

In looking into the circumstances in this case it seems to me but one conclusion can be reached, and that is that this child should be permitted to remain where she now is, with her maternal grandparents. The testimony shows they are doing all that is necessary for her enjoyment, her education, her health, her comfort, and welfare, and without expense to the ward or her estate. Her acquaintances, her associates, her friends, are all there, and she has all the advantages for moral and intellectual culture, with the accomplishments to be acquired in the best society; and were the change made as desired by petitioners, we are not sure she could have the benefit of all these. And I feel quite certain she would not. She is just at this time of an age when she needs the guardianship of the most exemplary and circumspect. She has now arrived at an age when impressions will become most lasting, and it is of the greatest importance to her future welfare that they should be correct. I do not think this Court would be justified in trying the experiment of transferring her custody to the grandparents at Washington, even though they were equally competent with those at Port Huron; a fact, however, I regret to say, I have been unable to find from the testimony. I am not prepared to give my assent to an experiment fraught with the danger of destroying the happiness of this innocent young girl's future life. There is no law which requires this Court to make such a decision, and justice to the dead as well as to the living protests against it.

Mr. and Mrs. Shaw have been duly appointed guardians of the child in this State. Under the agreement which was made by the father, on request of the mother, with Mrs. Shaw when she brought the child to Port Huron, that place became the child's residence, and it was not changed by the agreement which Mrs. Shaw subsequently signed under duress in Washington. By virtue of the letters of guardianship the respondents have also the lawful custody of their ward, and the testamentary guardians never had any right to such custody, except that which comity gave them, and which can never be properly enforced in this State, under the circumstances appearing in this case. Laws of 1883, p. 3; Laws of 1887, p. 147; How. Stat. § 6312; *In re Rice,* 42 Mich. 528 (4 N. W. Rep. 284); *Johnstone v. Beattie,* 10 Clark & F. 42; *Morrell v. Dickey,* 1 Johns. Ch. 153; *Kraft v. Wickey,* 4 Gill & J. 332; Story, Confl. Law, §§ 494-504; *Overseers v. Overseers,* 5 Cow. 527; *Riley v. Riley,* 3 Day, 74; *Fenwick v. Sear's Adm'rs,* 1 Cranch, 259; Whart. Confl. Laws, §§ 261-264; Reeve, Dom. Rel. 454; *Creuze v. Hunter,* 2 Cox, Ch. 242; *De Manneville v. De Manneville,* 10 Ves. 52; *Wood v. Wood,* 5 Paige, 596, 605;

Leonard v. Putnam, 51 N. H. 247; *Hubbard's Case,* 22 Alb. Law J. 315; *Ex parte Watkins,* 2 Ves. Sr. 470; *Woodworth v. Spring,* 4 Allen, 321; *Townsend v. Kendall,* 4 Minn. 412; *Boyd v. Glass,* 34 Ga. 253; *In re Turner,* 41 Law J. (Q. B.) 142; *Rowe v. Rowe,* 28 Mich. 353; *Corrie v. Corrie,* 42 Id. 509 (4 N. W. Rep. 213); *People v. Brown,* 35 Hun, 324; 2 Lead. Cas. Eq. (White & T. Notes), 1528; Hoch. Inf. § 56; *Gishwiler v. Dodez,* 4 Ohio St. 615; *McLoskey v. Reid,* 4 Bradf. Surr. 334; *Ex parte Dawson,* 3 Id. 130; *Bennet v. Bennet,* 13 N. J. Eq. 114; Tyler, Inf. 283, 285-292; *Dumain v. Gwynne,* 10 Allen, 270; *In re Spence,* 2 Phil. Ch. 247.

Comity cannot be considered in a case like this, when the future welfare of the child is the vital question in the case. The good of the child is superior to all other considerations. It is the polar star to guide to the conclusion in all cases of infants, whether the question is raised upon a writ of *habeas corpus* or in a court of chancery. The infant's desire in determining where she shall reside, if of sufficient age and uninfluenced, is always listened to with interest, and in this case we have it marked and most emphatic. She wants to remain where she is.

I think the duty of the Court in this case is plain and clear. I have no doubt of Mrs. Shaw's right to the custody of this child under the contract she made with her father at the death-bed of her mother, and I am entirely satisfied that she is now receiving the care she needs, and that her education is properly attended to, and that she is happy in her home and surroundings, and that she never could be at Washington, under the guardianship of her paternal grandparents.

In my judgment the writ should be denied, with costs, and the child should be allowed to remain where she now is, with Mr. and Mrs. Shaw, in Port Huron.

MORSE and LONG, JJ., concurred with SHERWOOD, C. J.

LAMAR v. MICOU, 112 U. S. 452, (1884).

This was an appeal by the executor of a guardian from a decree against him upon a bill in equity filed by the administratrix of his ward.

The original bill, filed on July 1, 1875, by Ann C. Sims, a citizen of Alabama, as administratrix of Martha M. Sims, in the Supreme Court of the State of New York, alleged that on December 11, 1855, the defendant's testator, Gazaway B. Lamar, was duly appointed, by the surrogate of the county of Richmond in that State, guardian of the person and estate of Martha M. Sims, an infant of six years of age, then a resident of that county, and gave bond as such, and took into his possession and control all her property, being more than $5,000; that on October 5, 1874, he died in New York, and on November 10, 1874, his will was there admitted to probate, and the defendant, a citizen of New York, was appointed his executor; and that he and his executor had neglected to render any account of his guardianship to the surrogate of Richmond county or to any court having cognizance thereof, or to the ward or her administratrix; and prayed for an account, and for judgment for the amount found to be due.

The defendant removed the case into the Circuit Court of the United States for the Southern District of New York; and there filed an answer, averring that in 1855, when Lamar was appointed guardian of Martha M. Sims, he was a citizen of Georgia, and she was a citizen of Alabama, having a temporary residence in the city of New York; that in the spring of 1861 the States of Georgia and Alabama declared themselves to have seceded from the United States, and to constitute members of the so-called Confederate States of America, whereupon a state of war arose between the United States and the Confederate States, which continued to be flagrant for more than four years after; that Lamar and Martha M. Sims were in the spring of 1861 citizens and residents of the States of Georgia and Alabama respectively, and citizens of the Confederate States, and were engaged in aiding and abetting the State of Georgia and the so-called Confederate States in their rebellion against the United

States, and she continued to aid and abet until the time of her death, and he continued to aid and abet till January, 1865; that the United States by various public acts declared all his and her property, of any kind, to be liable to seizure and confiscation by the United States, and they both were, by the various acts of Congress of the United States, outlawed and debarred of any access to any court of the United States, whereby it was impossible for Lamar to appear in the Surrogate's Court of Richmond county to settle and close his accounts there, and to be discharged from his liability as guardian, in consequence whereof the relation of guardian and ward, so far as it depended upon the orders of that court, ceased and determined; that, for the purpose of saving the ward's property from seizure and confiscation by the United States, Lamar, at the request of the ward and of her natural guardians, all citizens of the State of Alabama, withdrew the funds belonging to her from the city of New York, and invested them for her benefit and account in such securities as by the laws of the States of Alabama and Georgia and of the Confederate States he might lawfully do; that in 1864, upon the death of Martha M. Sims, all her property vested in her sister, Ann C. Sims, as her next of kin, and any accounting of Lamar for that property was to be made to her; that on March 15, 1867, at the written request of Ann C. Sims and of her natural guardians, Benjamin H. Micou was appointed her legal guardian by the Probate Court of Montgomery County, in the State of Alabama, which was at that time her residence, and Lamar thereupon accounted for and paid over all property, with which he was chargeable as guardian of Martha M. Sims, to Micou as her guardian, and received from him a full release therefor; and that Ann C. Sims when she became of age ratified and confirmed the same. To that answer the plaintiff filed a general replication.

The case was set down for hearing in the Circuit Court upon the bill, answer and replication, and a statement of facts agreed by the parties, in substance as follows:

On November 23, 1850, William W. Sims, a citizen of Georgia, died at Savannah in that State, leaving a widow, who was appointed his administratrix, and two infant daughters, Martha M. Sims, born at Savannah on September 8, 1849, and Ann C. Sims, born in Florida on June 1, 1851. In 1853 the widow married the Rev. Richard M. Abercrombie, of Clifton, in the county of Richmond and State of New York.

On December 11, 1855, on the petition of Mrs. Abercrombie, Gazaway B. Lamar, an uncle of Mr. Sims, and then residing at Brooklyn in the State of New York, was appointed by the surrogate of Richmond County guardian of the person and estate of each child "until she shall arrive at the age of fourteen years, and until another guardian shall be appointed;" and gave bond to her, with sureties, "to faithfully in all things discharge the duty of a guardian to the said minor according to law, and render a true and just account of all moneys and other property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof;" and he immediately received from Mrs. Abercrombie in money $5,166.89 belonging to each ward, and invested part of it in January and April, 1856, in stock of the Bank of the Republic at New York, and part of it in March and July, 1857, in stock of the Bank of Commerce at Savannah, each of which was then paying, and continued to pay until April, 1861, good dividends annually, the one of ten and the other of eight per cent.

In 1856, several months after Lamar's appointment as guardian, Mr. and Mrs. Abercrombie removed from Clifton, in the State of New York, to Hartford, in the State of Connecticut, and there resided till her death in the spring of 1859. The children lived with Mr. and Mrs. Abercrombie, Lamar as guardian paying Mr. Abercrombie for their board, at Clifton and at Hartford, from the marriage until her death; and were then removed to Augusta in the State of Georgia, and there lived with their paternal grandmother and her unmarried daughter and only living child, their aunt; Lamar as guardian continuing to pay their board. After 1856 neither of the children ever resided in the State of New York. On January 18, 1860, their aunt was married to Benjamin H. Micou, of Montgomery in the State of Alabama, and the children and their grandmother thereafter lived with Mr. and

Mrs. Micou at Montgomery, and the children were educated and supported at Mr. Micou's expense.

From 1855 to 1859 Lamar resided partly in Georgia and partly in New York. In the spring of 1861 he had a temporary residence in the city of New York, and upon the breaking out of the war of the rebellion, and after removing all his own property, left New York, and passed through the lines to Savannah, and there resided, sympathizing with the rebellion, and doing what he could to accomplish its success, until January, 1865, and continued to have his residence in Savannah until 1872 or 1873, when he went to New York again, and afterwards lived there. Mr. and Mrs. Micou also sympathized with the rebellion and desired its success, and each of them, as well as Lamar, failed during the rebellion to bear true allegiance to the United States.

At the time of Lamar's appointment as guardian, ten shares in the stock of the Mechanics Bank of Augusta in the State of Georgia, which had belonged to William W. Sims in his life-time, stood on the books of the bank in the name of Mrs. Abercrombie, as his administratrix, of which one-third belonged to her as his widow, and one-third to each of the infants. In January, 1856, the bank refused a request of Lamar to transfer one-third of that stock to him as guardian of each infant, but afterwards paid to him as guardian from time to time two-thirds of the dividends during the life of Mrs. Abercrombie, and all the dividends after her death until 1865. During the period last named, he also received as guardian the dividends on some other bank stock in Savannah, which Mrs. Abercrombie owned, and to which, on her death, her husband became entitled. Certain facts, relied on as showing that he, immediately after his wife's death, made a surrender of her interest in the bank shares to Lamar, as guardian of her children, are not material to the understanding of the decision of this court, but are recapitulated in the opinion of the Circuit Court. 7 Fed. Rep. 180-185.

In the winter of 1861-62, Lamar, fearing that the stock in the Bank of the Republic at New York, held by him as guardian, would be confiscated by the United States, had it sold by a friend in New York; the proceeds of the sale, which were about twenty per cent. less than the par value of the stock, invested at New York in guaranteed bonds of the cities of New Orleans, Memphis and Mobile, and of the East Tennessee and Georgia Railroad Company; and those bonds deposited in a bank in Canada.

Lamar from time to time invested the property of his wards, that was within the so-called Confederate States, in whatever seemed to him to be the most secure and safe—some in Confederate States bonds, some in the bonds of the individual States which composed the confederacy, and some in bonds of cities and of railroad corporations and stock of banks within these States.

On the money of his wards, accruing from dividends on bank stock, and remaining in his hands, he charged himself with interest until the summer of 1862, when, with the advice and aid of Mr. Micou, he invested $7,000 of such money in bonds of the Confederate States and of the State of Alabama; and in 1863, with the like advice and aid, sold the Alabama bonds for more than he had paid for them, and invested the proceeds also in Confederate States bonds; charged his wards with the money paid, and credited them with the bonds; and placed the bonds in the hands of their grandmother, who gave him a receipt for them and held them till the end of the rebellion, when they, as well as the stock in the banks at Savannah, became worthless.

Martha M. Sims died on November 2, 1864, at the age of fifteen years, unmarried and intestate, leaving her sister Ann C. Sims her next of kin. On January 12, 1867, Lamar, in answer to letters of inquiry from Mr. and Mrs. Micou, wrote to Mrs. Micou that he had saved from the wreck of the property of his niece, Ann C. Sims, surviving her sister, three bonds of the city of Memphis, indorsed by the State of Tennessee, one bond of the city of Mobile, and one bond of the East Tennessee and Georgia Railroad Company, each for $1,000, and with some coupons past due and uncollected; and suggested that by reason of his age and failing health, and of the embarrassed state of his own affairs, Mr. Micou should be appointed in Alabama guardian in his stead. Upon the receipt of this letter Mrs. Micou wrote to Lamar, thanking him for the explicit statement of the niece's affairs, and for the care and trouble he had had with her property; and Ann C.

Sims, then nearly sixteen years old, signed a request, attested by her grandmother and by Mrs. Micou, that her guardianship might be transferred to Mr. Micou, and that he might be appointed her guardian. And on March 15, 1867, he was appointed guardian of her property by the Probate Court of the county of Montgomery and State of Alabama, according to the laws of that State, and gave bond as such.

On May 14, 1867, Lamar sent to Micou complete and correct statements of his guardianship account with each of his wards, as well as all the securities remaining in his hands as guardian of either, and a check payable to Micou as guardian of Ann C. Sims for a balance in money due her; and Micou, as such guardian, signed and sent to Lamar a schedule of and receipt for the property, describing it specifically, by which it appeared that the bonds of the cities of New Orleans and Memphis and of the East Tennessee and Georgia Railroad Company were issued, and the Memphis bonds, as well as the railroad bonds, were indorsed by the State of Tennessee, some years before the breaking out of the rebellion. Micou thenceforth continued to act in all respects as the only guardian of Ann C. Sims until she became of age on June 1, 1872.

No objection or complaint was ever made by either of the wards, or their relatives, against Lamar's transactions or investments as guardian, until July 28, 1874, when Micou wrote to Lamar, informing him that Ann C. Sims desired a settlement of his accounts; and that he had been advised that no credits could be allowed for the investments in Confederate States bonds, and that Lamar was responsible for the security of the investments in other bonds and bank stock. Lamar was then sick in New York, and died there on October 5, 1874, without having answered the letter.

Before the case was heard in the Circuit Court, Ann C. Sims died on May 7, 1878; and on June 20, 1878, Mrs. Micou was appointed, in New York, administratrix *de bonis non* of Martha M. Sims, and as such filed a bill of revivor in this suit. On October 3, 1878, the defendant filed a cross bill, repeating the allegations of his answer to the original bill, and further averring that Ann

C. Sims left a will, which had been admitted to probate in Montgomery County in the State of Alabama, and afterwards in the county and State of New York, by which she gave all her property to Mrs. Micou, who was her next of kin; and that Mrs. Micou was entitled to receive for her own benefit whatever might be recovered in the principal suit, and was estopped to deny the lawfulness or propriety of Lamar's acts, because whatever was done by him as guardian of Martha M. Sims in her lifetime, or as guardian of the interests of Ann C. Sims as her next of kin, was authorized and approved by Mrs. Micou and her mother and husband as the natural guardians of both children. Mrs. Micou, as plaintiff in the bill of revivor, answered the cross bill, alleging that Ann succeeded to Martha's property as administratrix, and not as her next of kin, admitting Ann's will and the probate thereof, denying that Mrs. Micou was a natural guardian of the children, and denying that she approved or ratified Lamar's acts as guardian. A general replication was filed to that answer.

Upon a hearing on the pleadings and the agreed statement of facts, the Circuit Court dismissed the cross bill, held all Lamar's investments to have been breaches of trust, and entered a decree referring the case to a master to state an account. The case was afterwards heard on exceptions to the master's report, and a final decree entered for the plaintiff for $18,705.19, including the value before 1861 of those bank stocks in Georgia of which Lamar had never had possession. The opinion delivered upon the first hearing is reported in 17 Blatchford, 378, and in 1 Fed. Rep. 14, and the opinion upon the second hearing in 7 Fed. Rep. 180. The defendant appealed to this court.

Mr. Justice Gray delivered the opinion of the court. He recited the facts as above stated, and continued:

The authority of the Surrogate's Court of the county of Richmond and State of New York to appoint Lamar guardian of the persons and property of infants at the time within that county, and the authority of the Supreme Court of the State of New York, in which this suit was originally brought, being a court of general equity jurisdiction, to take cognizance thereof, are not disputed; and upon the facts agreed it is quite clear that none of the defences set up in the answer afford any ground for dismissing the bill.

The war of the rebellion, and the residence of both ward and guardian within the territory controlled by the insurgents, did not discharge the guardian from his responsibility to account, after the war, for property of the wards which had at any time come into his hands, or which he might by the exercise of due care have obtained possession of. A state of war does not put an end to pre-existing obligations, or transfer the property of wards to their guardians, or release the latter from the duty to keep it safely, but suspends until the return of peace the right of any one residing in the enemy's country to sue in our courts. *Ward* v. *Smith,* 7 Wall. 447; *Montgomery* v. *United States,* 15 Wall. 395, 400; *Insurance Co.* v. *Davis,* 95 U. S. 425, 430; *Kershaw* v. *Kelsey,* 100 Mass. 561, 563, 564, 570; 3 Phillimore International Law (2d ed.) § 589.

The appointment of Micou in 1867 by a court of Alabama to be guardian of the surviving ward, then residing in that State, did not terminate Lamar's liability for property of his wards which he previously had or ought to have taken possession of. The receipt given by Micou was only for the securities and money actually handed over to him by Lamar; and if Micou had any authority to discharge Lamar from liability for past mismanagement of either ward's property, he never assumed to do so.

The suggestion in the answer, that the surviving ward, upon coming of age, ratified and approved the acts of Lamar as guardian, finds no support in the facts of the case.

The further grounds of defence, set up in the cross bill, that Micou participated in Lamar's investments, and that Mrs. Micou approved them, are equally unavailing. The acts of Micou, before his own appointment as guardian, could not bind the ward. And admissions in private letters from Mrs. Micou to Lamar could not affect the rights of the ward, or Mrs. Micou's authority, upon being afterwards appointed administratrix of the ward, to maintain this bill as such against Lamar's representative, even if the amount recovered will inure to her own benefit as the ward's next of kin. 1 Greenl. Ev. § 179.

The extent of Lamar's liability presents more difficult questions of law, now for the first time brought before this court.

The general rule is everywhere recognized, that a guardian or trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions, no attempt has been made to establish a more definite rule; in others, the discretion has been confined, by the legislature or the courts, within strict limits.

The Court of Chancery, before the Declaration of Independence, appears to have allowed some latitude to trustees in making investments. The best evidence of this is to be found in the judgments of Lord Hardwicke. He held, indeed, in accordance with the clear weight of authority before and since, that money lent on a mere personal obligation, like a promissory note, without security, was at the risk of the trustee. *Ryder* v. *Bickerton,* 3 Swanston, 80, note; *S. C.* 1 Eden, 149, note; *Barney* v. *Saunders,* 16 How. 535, 545; Perry on Trusts, § 453. But in so holding, he said: "For it should have been on some such security as binds land, or something, to be answerable for it." 3 Swanston, 81, note. Although in one case he held that a trustee, directed by the terms of his trust to invest the trust money in government funds or other good securities, was responsible for a loss caused by his investing it in South Sea stock; and observed that neither South Sea stock nor bank stock was considered a good security, because it depended upon the management of the governor and directors, and the capital might be wholly lost; *Trafford* v. *Boehm,* 3 Atk. 440, 444; yet in another case he declined to charge a trustee for a loss on South Sea stock which had fallen in value since the trustee received it; and said that "to compel trustees to make up a deficiency, not owing to their wilful default, is the harshest demand that can be made in a court of equity." *Jackson* v. *Jackson,* 1 Atk. 513, 514; *S. C.* West Ch. 31, 34. In a later case he said: "Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which arftewards sink in their value, or on a security at the time apparently good, which afterwards turns out not to be so, for the benefit of the *cestui que* *trust,* was there ever an instance of the trustee's being made to answer the actual sum so placed out? I answer, No. If there is no *mala fides,* nothing wilful in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it; to add hazard or risk to that trouble, and subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." That this opinion was not based upon the fact that in England trustees usually receive no compensation is clearly shown by the Chancellor's adding that the same doctrine held good in the case of a receiver, an officer of the court, and paid for his trouble; and the point decided was that a receiver, who paid the amount of rents of estates in his charge to a Bristol tradesman of good credit, taking his bills therefor on London, was not responsible for the loss of the money by his becoming bankrupt. *Knight* v. *Plymouth,* 1 Dickens, 120, 126, 127; *S. C.* 3 Atk. 480. And the decision was afterwards cited by Lord Hardwicke himself as showing that when trustees act by other hands, according to the usage of business, they are not answerable for losses. *Ex parte Belchier,* Ambler, 219; *S. C.* 1 Kenyon, 38, 47.

In later times, as the amount and variety of English government securities increased, the Court of Chancery limited trust investments to the public funds, disapproved investments either in bank stock, or in mortgages of real estate, and prescribed so strict a rule that Parliament interposed; and by the statutes of 22 & 23 Vict. ch. 35, and 23 & 24 Vict. ch. 38, and by general orders in chancery, pursuant to those statutes, trustees have been authorized to invest in stock of the Bank of England or of Ireland, or upon mortgage of freehold or copyhold estates, as well as in the public funds. Lewin on Trusts (7th ed.) 282, 283, 287.

In a very recent case, the Court of Appeal and the House of Lords, following the decisions of Lord Hardwicke, in *Knight* v. *Plymouth* and *Ex parte Belchier,* above cited, held that a trustee investing trust funds, who employed a broker to procure securities authorized by the trust, and paid the purchase money to the broker, if such was the usual and regular course of business of persons acting with reasonable care and prudence on their own account, was not liable for the loss of the money by fraud of the broker. Sir George Jessel, M. R., Lord Justice Bowen, and Lord Blackburn affirmed the general rule that a trustee is only bound to conduct the business of his trust in the same manner that an ordinary prudent man of business would conduct his own; Lord Blackburn adding the qualification that "a trustee must not choose investments other than those which the terms of his trust permit." *Speight* v. *Gaunt,* 22 Ch. D. 727, 739, 762; 9 App. Cas. 1, 19.

In this country, there has been a diversity in the laws and usages of the several States upon the subject of trust investments.

In New York, under Chancellor Kent, the rule seems to have been quite undefined. See *Smith* v. *Smith,* 4 Johns. Ch. 281, 285; *Thompson* v. *Brown,* 4 Johns. Ch. 619, 628, 629, where the chancellor quoted the passage above cited from Lord Hardwicke's opinion in *Knight* v. *Plymouth.* And in *Brown* v. *Campbell,* Hopk. Ch. 233, where an executor in good faith made an investment, considered at the time to be advantageous, of the amount of two promissory notes, due to his testator from one manufacturing corporation, in the stock of another manufacturing corporation, which afterwards became insolvent, Chancellor Sanford held that there was no reason to charge him with the loss. But by the later decisions in that State investments in bank or railroad stock have been held to be at the risk of the trustee, and it has been intimated that the only investments that a trustee can safely make without an express order of court are in government or real estate securities. *King* v. *Talbot,* 40 N. Y. 76, affirming *S. C.* 50 Barb. 453; *Ackerman* v. *Emott,* 4 Barb. 626; *Mills* v. *Hoffman,* 26 Hun, 594; 2 Kent Com. 416, note *b.* So the decisions in New Jersey and Pennsylvania tend to disallow investments in the stock of banks or other business corporations, or otherwise than in the public funds or in mortgages of real estate. *Gray* v. *Fox,* Saxton, 259, 268; *Halstead* v. *Meeker,* 3 C. E. Green, 136; *Lathrop* v. *Smalley,* 8 C. E. Green, 192; *Worrell's Appeal,* 9 Penn. St. 508, and 23 Penn. St. 44; *Hemphill's Appeal,* 18 Penn. St. 303; *Ihmsen's Appeal,* 43 Penn. St. 431. And the New York and Pennsylvania courts have shown a strong disinclination to permit investments in real estate or securities out of their jurisdiction. *Ormiston* v. *Olcott,* 84 N. Y. 339; *Rush's Estate,* 12 Penn. St. 375, 378.

In New England, and in the Southern States, the rule has been less strict.

In Massachusetts, by a usage of more than half a century, approved by a uniform course of judicial decision, it has come to be regarded as too firmly settled to be changed, except by the legislature, that all that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion, such as men of prudence and intelligence exercise in the permanent disposition of their own funds, having regard not only to the probable income, but also to the probable safety of the capital; and that a guardian or trustee is not precluded from investing in the stock of banking, insurance, manufacturing or railroad corporations, within or without the State. *Harvard College* v. *Amory,* 9 Pick. 446, 461; *Lovell* v. *Minot,* 20 Pick. 116, 119; *Kinmonth* v. *Brigham,* 5 Allen, 270, 277; *Clark* v. *Garfield,* 8 Allen, 427; *Brown* v. *French,* 125 Mass. 410; *Bowker* v. Pierce, 130 Mass. 262. In New Hampshire and in Vermont, investments, honestly and prudently made, in securities of any kind that produce income, appear to be allowed. *Knowlton* v. *Bradley,* 17 N. H. 458; *Kimball* v. *Reding,* 11 Foster, 352, 374; *French* v. *Currier,* 47 N. H. 88, 99; *Barney* v. *Parsons,* 54 Vermont, 623.

In Maryland, good bank stock, as well as government securities and mortgages on real estate, has always been considered a proper investment. *Hammond* v. *Hammond,* 2 Bland. 306, 413; *Gray* v. *Lynch,* 8 Gill, 403; *Murray* v. *Feinour,* 2 Maryland Ch. 418. So in Mississippi, investment in bank stock is allowed. *Smyth* v. *Burns,* 25 Mississippi, 422.

In South Carolina, before the war, no more definite rule appears to have been laid down than that guardians and trustees must manage the funds in their hands as prudent men manage their own affairs. *Boggs* v. *Adger,* 4 Rich. Eq. 408, 411; *Spear*

v. *Spear,* 9 Rich. Eq. 184, 201; *Snelling* v. *McCreary,* 14 Rich. Eq. 291, 300.

In Georgia, the English rule was never adopted; a statute of 1845, which authorized executors, administrators, guardians and trustees, holding any trust funds, to invest them in securities of the State, was not considered compulsory; and before January 1, 1863 (when that statute was amended by adding a provision that any other investment of trust funds must be made under a judicial order, or else be at the risk of the trustee), those who lent the fund at interest, on what was at the time considered by prudent men to be good security, were not held liable for a loss without their fault. Cobb's Digest, 333; Code of 1861, § 2308; *Brown* v. *Wright,* 39 Georgia, 96; *Moses* v. *Moses,* 50 Georgia, 9, 33.

In Alabama, the Supreme Court, in *Bryant* v. *Craig,* 12 Alabama, 354, 359, having intimated that a guardian could not safely invest upon either real or personal security without an order of court, the legislature, from 1852, authorized guardians and trustees to invest on bond and mortgage, or on good personal security, with no other limit than fidelity and prudence might require. Code of 1852, § 2024; Code of 1867, § 2426; *Foscue* v. *Lyon,* 55 Alabama, 440, 452.

The rules of investment varying so much in the different States, it becomes necessary to consider by what law the management and investment of the ward's property should be governed.

As a general rule (with some exceptions not material to the consideration of this case) the law of the domicil governs the status of a person, and the disposition and management of his movable property. The domicil of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate; although, for the protection of either, a guardian may be appointed in any State where the person or any property of an infant may be found. On the continent of Europe, the guardian appointed in the State of the domicil of the ward is generally recognized as entitled to the control and dominion of the ward and his movable property everywhere, and guardians specially appointed in other States are responsible to the principal guardian. By the law of England and of this country, a guardian appointed by the courts of one State has no authority over the ward's person or property in another State, except so far as allowed by the comity of that State, as expressed through its legislature or its courts; but the tendency of modern statutes and decisions is to defer to the law of the domicil, and to support the authority of the guardian appointed there. *Hoyt* v. *Sprague,* 103 U. S. 613, 631, and authorities cited; *Morrell* v. *Dickey,* 1 Johns. Ch. 153; *Woodworth* v. *Spring,* 4 Allen, 321; *Milliken* v. *Pratt,* 125 Mass. 374, 377, 378; *Leonard* v. *Putnam,* 51 N. H. 247; *Commonwealth* v. *Rhoads,* 37 Penn. St. 60; *Sims* v. *Renwick,* 25 Georgia, 58; Dicey on Domicil, 172-176; Westlake Private International Law (2d ed.) 48-50; Wharton Conflict of Laws, (2d ed.) §§ 259-268.

An infant cannot change his own domicil. As infants have the domicil of their father, he may change their domicil by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicil, change the domicil of the infants; the domicil of the children, in either case, following the independent domicil of their parent. *Kennedy* v. *Ryall,* 67 N. Y. 379; *Potinger* v. *Wightman,* 3 Meriv. 67; *Dedham* v. *Natick,* 16 Mass. 135; Dicey on Domicil, 97-99. But when the widow, by marrying again, acquires the domicil of a second husband, she does not, by taking her children by the first husband to live with her there, make the domicil which she derives from her second husband their domicil; and they retain the domicil which they had, before her second marriage, acquired from her or from their father. *Cumner* v. *Milton,* 3 Salk. 259; *S. C.* Holt, 578; *Freetown* v. *Taunton,* 16 Mass. 52; *School Directors* v. *James,* 2 Watts & Sergeant, 568; *Johnson* v. *Copeland,* 35 Alabama, 521; *Brown* v. *Lynch,* 2 Bradford, 214; *Mears* v. *Sinclair,* 1 West Virginia, 185; Pothier Introduction Generale aux Coutumes, No. 19; 1 Burge Colonial and Foreign Law, 39; 4 Phillimore International Law (2d ed.) § 97.

The preference due to the law of the ward's domicil, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property should be governed by the law of the State of his domicil, especially when he actually resides there, rather than by the law of any State in which a guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the State of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from State to State, from considerations of health, education, pleasure or convenience, and guardians were appointed in each State, the guardians appointed in the different States, even if the same persons, might be held to diverse rules of accounting for different parts of the ward's property. The form of accounting, so far as concerns the remedy only, must indeed be according to the law of the court in which relief is sought; but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicil of the ward. Bar International Law, § 106 (Gillespie's translation), 438; Wharton Conflict of Laws, § 259.

It may be suggested that this would enable the guardian, by changing the domicil of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicil, may change that domicil. But the ward does not derive a domicil from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicil that the father had. *Wood* v. *Wood,* 5 Paige, 596, 605. And any guardian, appointed in the State of the domicil of the ward, has been generally held to have the power of changing the ward's domicil from one county to another within the same State and under the same law. *Cutts* v. *Haskins,* 9 Mass. 543; *Holyoke* v. *Haskins,* 5 Pick. 20; *Kirkland* v. *Whately,* 4 Allen, 462; *Anderson* v. *Anderson,* 42 Vermont, 350; *Ex parte Bartlett,* 4 Bradford, 221; *The Queen* v. *Whitby,* L. R. 5 Q. B. 325, 331. But it is very doubtful, to say the least, whether even a guardian appointed in the State of the domicil of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicil beyond the limits of the State in which the guardian is appointed and to which his legal authority is confined. *Douglas* v. *Douglas,* L. R. 12 Eq. 617, 625; *Daniel* v. *Hill,* 52 Alabama, 430; Story Conflict of Laws, § 506, note; Dicey on Domicil, 100, 132. And it is quite clear that a guardian appointed in a State in which the ward is temporarily residing cannot change the ward's permanent domicil from one State to another.

The case of such a guardian differs from that of an executor of, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. The executor or trustee is appointed at the domicil of the testator; the guardian is most fitly appointed at the domicil of the ward, and may be appointed in any State in which the person or any property of the ward is found. The general rule which governs the administration of the property in the one case may be the law of the domicil of the testator; in the other case, it is the law of the domicil of the ward.

As the law of the domicil of the ward has no extra-territorial effect, except by the comity of the State where the property is situated, or where the guardian is appointed, it cannot of course prevail against a statute of the State in which the question is presented for adjudication, expressly applicable to the estate of a ward domiciled elsewhere. *Hoyt* v. *Sprague,* 103 U. S. 613. Cases may also arise with facts so peculiar or so complicated as to modify the degree of influence that the court in which the guardian is called to account may allow to the law of the domicil of the ward, consistently with doing justice to the parties before it. And a guardian, who had in good faith conformed to the law of the State in which he was appointed, might perhaps be excused for not having complied with stricter rules prevailing at the domicil of the ward. But in a case in which the domicil of the ward has always been in a State whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the State in which he was appointed.

The domicil of William W. Sims during his life and at the time of his death in 1850 was in Georgia. This domicil continued to be the domicil of his widow and of their infant children until they acquired new ones. In 1853, the widow, by marrying the Rev. Mr. Abercrombie, acquired his domicil. But she did not, by taking the infants to the home, at first in New York and afterwards in Connecticut, of her new husband, who was of no kin to the children, was under no legal obligation to support them, and was in fact paid for their board out of their property, make his domicil, or the domicil derived by her from him, the domicil of the children of the first husband. Immediately upon her death in Connecticut, in 1859, these children, both under ten years of age, were taken back to Georgia to the house of their father's mother and unmarried sister, their own nearest surviving relatives; and they continued to live with their grandmother and aunt in Georgia until the marriage of the aunt in January, 1860, to Mr. Micou, a citizen of Alabama, after which the grandmother and the children resided with Mr. and Mrs. Micou at their domicil in that State.

Upon these facts, the domicil of the children was always in Georgia from their birth until January, 1860, and thenceforth was either in Georgia or in Alabama. As the rules of investment prevailing before 1863 in Georgia and in Alabama did not substantially differ, the question in which of those two States their domicil was is immaterial to the decision of this case; and it is therefore unnecessary to consider whether their grandmother was their natural guardian, and as such had the power to change their domicil from one State to another. See Hargrave's note 66 to Co. Lit. 88 *b*; Reeve Domestic Relations, 315; 2 Kent Com. 219; Code of Georgia of 1861, §§ 1754, 2452; *Darden* v. *Wyatt*, 15 Georgia, 414.

Whether the domicil of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicil was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicil.

It remains to apply the test of that law to Lamar's acts or omissions with regard to the various kinds of securities in which the property of the wards was invested.

1. The sum which Lamar received in New York in money from Mrs. Abercrombie he invested in 1856 and 1857 in stock of the Bank of the Republic at New York, and of the Bank of Commerce at Savannah, both of which were then, and continued till the breaking out of the war, in sound condition, paying good dividends. There is nothing to raise a suspicion that Lamar, in making these investments, did not use the highest degree of prudence; and they were such as by the law of Georgia or of Alabama he might properly make. Nor is there any evidence that he was guilty of neglect in not withdrawing the investment in the stock of the Bank of Commerce at Savannah before it became worthless. He should not therefore be charged with the loss of that stock.

The investment in the stock of the Bank of the Republic of New York being a proper investment by the law of the domicil of the wards, and there being no evidence that the sale of that stock by Lamar's order in New York in 1862 was not judicious, or was for less than its fair market price, he was not responsible for the decrease in its value between the times of its purchase and of its sale. He had the authority, as guardian, without any order of court, to sell personal property of his ward in his own possession, and to reinvest the proceeds. *Field* v. *Schieffelin,* 7 Johns. Ch. 150; *Ellis* v. *Essex Merrimack Bridge,* 2 Pick. 243. That his motive in selling it was to avoid its being confiscated by the United States does not appear to us to have any bearing on the rights of these parties. And no statute under which it could have been confiscated has been brought to our notice. The act of July 17, 1862, ch. 195, § 6, cited by the appellant, is limited to property of persons engaged in or abetting armed rebellion, which could hardly be predicated of two girls under thirteen years of age. 12 Stat. 591. Whatever liability, criminal or civil, Lamar may have incurred or avoided as towards the United States, there was nothing in his selling this stock, and turning it into money, of which his wards had any right to complain.

As to the sum received from the sale of the stock in the Bank of the Republic, we find nothing in the facts agreed by the parties, upon which the case was heard, to support the argument that Lamar, under color of protecting his wards' interests, allowed the funds to be lent to cities and other corporations which were aiding in the rebellion. On the contrary, it is agreed that that sum was applied to the purchase in New York of guaranteed bonds of the cities of New Orleans, Memphis and Mobile, and of the East Tennessee and Georgia Railroad Company; and the description of those bonds, in the receipt afterwards given by Micou to Lamar, shows that the bonds of that railroad company, and of the cities of New Orleans and Memphis, at least, were issued some years before the breaking out of the rebellion, and that the bonds of the city of Memphis and of the railroad company were at the time of their issue indorsed by the State of Tennessee. The company had its charter from that State, and its road was partly in Tennessee and partly in Georgia. Tenn. St. 1848, ch. 169. Under the discretion allowed to a guardian or trustee by the law of Georgia and of Alabama, he was not precluded from investing the funds in his hands in bonds of a railroad corporation, indorsed by the State by which it was chartered, or in bonds of a city. As Lamar, in making these investments, appears to have used due care and prudence, having regard to the best pecuniary interests of his wards, the sum so invested should be credited to him in this case, unless, as suggested at the argument, the requisite allowance has already been made in the final decree of the Circuit Court in the suit brought by the representative of the other ward, an appeal from which was dismissed by this court for want of jurisdiction in 104 U. S. 465.

2. Other moneys of the wards in Lamar's hands, arising either from dividends which he had received on their behalf, or

from interest with which he charged himself upon sums not invested, were used in the purchase of bonds of the Confederate States, and of the State of Alabama.

The investment in bonds of the Confederate States was clearly unlawful, and no legislative act or judicial decree or decision of any State could justify it. The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Thorington* v. *Smith*, 8 Wall. 1; *Head* v. *Starks*, Chase, 312; *Horn* v. *Lockhart*, 17 Wall. 570; *Confederate Note Case*, 19 Wall. 548; *Sprott* v. *United States*, 20 Wall. 459; *Fretz* v. *Stover*, 22 Wall. 198; *Alexander* v. *Bryan*, 110 U. S. 414. An infant has no capacity, by contract with his guardian, or by assent to his unlawful acts, to affect his own rights. The case is governed in this particular by the decision in *Horn* v. *Lockhart*, in which it was held that an executor was not discharged from his liability to legatees by having invested funds, pursuant to a statute of the State, and with the approval of the probate court by which he had been appointed, in bonds of the Confederate States, which became worthless in his hands.

Neither the date nor the purpose of the issue of the bonds of the State of Alabama is shown, and it is unnecessary to consider the lawfulness of the investment in those bonds, because Lamar appears to have sold them for as much as he had paid for them, and to have invested the proceeds in additional Confederate States bonds, and for the amount thereby lost to the estate he was accountable.

3. The stock in the Machanics' Bank of Georgia, which had belonged to William W. Sims in his lifetime, and stood on the books of the bank in the name of his administratrix, and of which one-third belonged to her as his widow, and one-third to each of

the infants, never came into Lamar's possession; and upon a request made by him, the very next month after his appointment, the bank refused to transfer to him any part of it. He did receive and account for the dividends; and he could not, under the law of Georgia concerning foreign guardians, have obtained possession of property of his wards within that State without the consent of the ordinary. Code of 1861, §§ 1834-1839. The attempt to charge him for the value of the principal of the stock must fail for two reasons: First. This very stock had not only belonged to the father of the wards in his lifetime, but it was such stock as a guardian or trustee might properly invest in by the law of Georgia. Second. No reason is shown why this stock, being in Georgia, the domicil of the wards, should have been transferred to a guardian who had been appointed in New York during their temporary residence there.

The same reasons are conclusive against charging him with the value of the bank stock in Georgia, which was owned by Mrs. Abercrombie in her own right, and to which Mr. Abercrombie became entitled upon her death. It is therefore unnecessary to consider whether there is sufficient evidence of an immediate surrender by him of her interest to her children.

The result is, that

Both the decrees of the Circuit Court in this case must be reversed, and the case remanded for further proceedings in conformity with this opinion.

LAMAR v. MICOU, 114 U. S. 218, (1884).

This was a petition for a rehearing of *Lamar* v. *Micou*, decided at this term and reported 112 U. S. 452.

Mr. Stephen P. Nash and *Mr. George C. Holt* filed a brief for the petitioner.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a petition for a rehearing of an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, upon a bill filed against the executor of a guardian by the administratrix of his ward.

Gazaway B. Lamar was appointed in 1855, by a surrogate's court in New York, guardian of the person and property of Martha M. Sims. The bill alleged that at the time of the appointment the ward resided in New York. The answer alleged that at that time she was temporarily residing there, and was then, as well as in 1861, a citizen of Alabama. The hearing of the merits of the case was had in the Circuit Court upon the pleadings, and upon certain facts stated by the defendant and admitted by the plaintiff, which, so far as they affected the domicil of the ward, were as follows:

William W. Sims, the ward's father, died at Savannah in the State of Georgia in 1850, leaving two infant daughters, and a widow, who in 1853 married a citizen of New York, and thenceforth resided with him in that State until 1856 ,when they removed to Connecticut, and resided there until her death in 1859. The two infants lived with their mother and stepfather in New York (where Lamar was appointed in 1855 guardian of both infants) and in Connecticut, from her second marriage until her death, and then went to Georgia, and thenceforth resided with their father's mother and her daughter and only living child, their aunt, at first in Georgia and afterwards in Alabama.

Upon those facts, this court assumed the domicil of William W. Sims to have been in Georgia; and held that the domicil of his children continued to be in that State throughout their residence with their mother and her second husband in New York and Connecticut, and until their return to Georgia upon the death of their mother in 1859, and was thereafter in Georgia or Alabama; that whether the guardian's domicil was in Georgia or New York, he should not, in accounting for his investments, be held to a narrower range of securities than was allowed by the law of the ward's domicil; and that many of his investments were justified by the law of Georgia or of Alabama; and therefore reversed the decree of the Circuit Court, which had held him to account according to the law of New York for the manner in which he had invested the property. 112 U. S. 452.

The questions so passed upon, though hardly touched by either counsel at the first argument, arose upon the facts admitted, were vital to the determination of the rights of the parties, and could not be overlooked by this court. The importance and comparative novelty of some of the questions induced the court to invite the submission of a full brief in support of the petition for a rehearing. But, upon careful consideration of the petition and brief, the court has seen no ground for changing its opinion, and has not thought it necessary to add anything, beyond what has been suggested by examination of the authorities cited for the petitioner.

In *Pritchard* v. *Norton,* 106 U. S. 124, the point decided was that the validity and effect of a bond, executed in New York, to indemnify the obligee therein against his liability upon an appeal bond executed by him in a suit in Louisiana, was to be governed by the law of Louisiana.The decision was based upon the fundamental rule, or, in the words of Chief Justice Marshall, the "principle of universal law"—"that in every forum a contract is governed by the law with a view to which it was made." *Wayman v. Southard,* 10 Wheat. 1, 48. And reference was made to two recent English cases of high authority, in which, by force of that rule, the effect of a contract of affreightment, and of a bottomry bond given by the master, was held to be governed, not by the law of the place where the contract was made, nor by that of the place where it was to be performed, nor yet by the law of the place in which the suit was brought, but by the law of the country to which the ship belonged. *Lloyd* v. *Guibert,* 6 B. & S. 100; *S. C.,* L. R. 1 Q. B. 115; *The Gaetano & Maria,* 7 P. D. 137.

In *Lloyd* v. *Guibert,* Mr. Justice Willes, delivering the judgment of the Court of Exchequer Chamber, said that when "disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby," "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter." 6 B. & S. 130; L. R. 1 Q. B. 120. And in *The Gaetano & Maria,* Lord Justice

Brett, with whom Lord Coleridge and Lord Justice Cotton concurred, pointed out that the matter before the court was "not the question of the construction of a contract, but of what authority arises out of the fact of a contract having been entered into." 7 P. D. 147.

The question in what securities a guardian may lawfully invest is not one of mere construction of the contract expressed in the guardian's bond or implied by his acceptance of the guardianship, but rather of what is "within the sphere of the relation established thereby," or "what authority arises out of the fact of a contract having been entered into." And the very terms of Lamar's bond do not point to the law of New York only, but impose a general obligation to "discharge the duty of a guardian to the said minor according to law," as well as to render accounts of the property and of his guardianship to any court having cognizance thereof. See 112 U. S. 455.

The view heretofore expressed by this court, that the domicil of the guardian is immaterial, and that, as a general rule, the management and investment of the ward's property are to be governed by the law of the domicil of the ward, although, so far as the remedy is concerned, the accounting must conform to the law of the place in which the liability of the guardian is sought to be enforced, accords with the statements of Bar, as well in the passage quoted by the petitioner, as in that referred to in the former opinion; and the only decision of a Scotch court brought to our notice tends in the same direction, although the Scotch commentators treat the question as an open one. Bar International Law, §§ 87, 106; (Gillespie's translation) 357, 359, 438, 445 note; *Lamb* v. *Montgomerie* (1858) 20 Scotch Ct. of Sess. Cas. (2d series) 1323; Fraser on Parent & Child, 609.

The cases of *Preston* v. *Melville,* 8 Cl. & Fin. 1, and *Blackwood* v. *The Queen,* 8 App. Cas. 82, cited for the petitioner, relate only to the place in which personal property of a deceased person is to be administered, or is subject to probate duty.

The petitioner, while admitting that the statement in the former opinion that the domicil of the father was in Georgia was a natural inference from the facts stated in the record, and that it is probable that the wards never acquired a domicil in any Northern State, has now offered affidavits tending to show that the father's domicil at the time of his death and for six years before, was not in Georgia, but in Florida; and has referred to statutes and decisions in Florida as showing that the law of that State in the matter of investments did not differ from the law of New York. Florida Stat. November 20, 1828, § 35; Thompson's Digest, 207, 208; *Moore* v. *Hamilton,* 4 Florida, 112, and 7 Florida, 44.

But if, against all precedent, this new evidence could be admitted after argument and decision in this court, it would afford no ground for arriving at a different conclusion upon the merits of the case.

If the domicil of the father was in Florida at the time of his death in 1850, then, according to the principles stated in the former opinion, the domicil of his children continued to be in that State until the death of their mother in Connecticut in 1859. In that view of the case, the question would be whether they afterwards acquired a domicil in Georgia by taking up their residence there with their paternal grandmother. Although some books speak only of the father, or, in case of his death, the mother, as guardian by nature; 1 Bl. Com. 461; 2 Kent Com. 219; it is clear that the grandfather or grandmother, when the next of kin, is such a guardian. Hargrave's note, 66 to Co .Lit. 88 *b;* Reeve, Domestic Relations, 315. See also *Darden* v. *Wyatt,* 15 Georgia, 414. In the present case, the infants, when their mother died and they went to the home of their paternal grandmother, were under ten years of age; the grandmother, who appears to have been their only surviving grandparent and their next of kin, and whose only living child, an unmarried daughter, resided with her, was the head of the family; and upon the facts agreed it is evident that the removal of the infants after the death of both parents to the home of their grandmother in Georgia was with Lamar's consent. Under these circumstances, there can be no doubt that by taking up their residence with her they acquired her domicil in that State in 1859, if their domicil was not already there. And there being no evidence that any of Lamar's investments had diminished in value before that time, it is immaterial whether the previous domicil of the wards was in Florida or in Georgia, inasmuch as the propriety of his investments was therafter to be governed by the law of Georgia.

The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. *Owings* v. *Hull,* 9 Pet. 607; *Pennington* v. *Gibson,* 16 How. 65; *Covington Drawbridge Co.* v. *Shepherd,* 20 How. 227. And nothing has now been adduced tending to show that, as applied to the facts admitted by the parties, either the law of Georgia or the law of New York was other than we have held it to be.

The question whether, as matter of fact, Lamar acted with due care and prudence in making his investments, was argued at the former hearing, and no reason is shown for reopening that question.

Rehearing denied.

ADMINISTRATION.

WILKINS v. ELLETT, 108 U. S. 256, (1883).

The nature of the action and the facts appear in the opinion.

Mr. W. Y. C. Humes and *Mr. D. H. Poston* for plaintiff in error.

Mr. S. P. Walker and *Mr. R. T. McNeal* for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This is an action of assumpsit on the common counts, brought in the Circuit Court of the United States for the Western District of Tennessee. The plaintiff is a citizen of Virginia, and sues as administrator, appointed in Tennessee, of the estate of Thomas N. Quarles. The defendant is a citizen of Tennessee, and surviving partner of the firm of F. H. Clark & Company. The answer sets up that Quarles was a citizen of Alabama at the time of his death; that the sum sued for has been paid to William Goodloe, appointed his administrator in that State, and has been inventoried and accounted for by him upon a final settlement of his administration; and that there are no creditors of Quarles in Tennessee. The undisputed facts, appearing by the bill of exceptions, are as follows:

Quarles was born at Richmond, Virginia, in 1835. In 1839 his mother, a widow, removed with him, her only child, to Courtland, Alabama. They lived there together until 1856, and she made her home there until her death in 1864. In 1856 he went to Memphis, Tennessee, and there entered the employment of F. H. Clark & Company, and continued in their employ as a clerk, making no investments himself, but leaving his surplus earnings on interest in their hands, until January, 1866, when he went to the house of a cousin in Courtland, Alabama, and while there died by an accident, leaving personal estate in Alabama. On the 27th of January, 1866, Goodloe took out letters of administration in Alabama, and in February, 1866, went to Memphis, and there, upon exhibiting his letters of administration, received from the defendant the sum of money due to Quarles, amounting to $3,455.22 (which is the same for which this suit is brought), and included it in his inventory, and in his final account, which was allowed by the probate court in Alabama. There were no debts due from Quarles in Tennessee. All his next of kin resided in Virginia or in Alabama; and no administration was taken out on his estate in Tennessee until June, 1866, when letters of administration were there issued to the plaintiff.

There was conflicting evidence upon the question whether the domicil of Quarles at the time of his death was in Alabama or in Tennessee. The jury found that it was in Tennessee, under instructions, the correctness of which we are not prepared to affirm, but need not consider, because assuming them to be correct, we are of opinion that the court erred in instructing the jury that, if the domicil was in Tennessee, they must find for the plaintiff; and in refusing to instruct them, as requested by the defendant, that the payment to the Alabama administrator before the appointment of one in Tennessee, and there being no Tennessee creditors, was a valid discharge of the defendant, without reference to the domicil.

There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicil at the time of his death; that the proper place for the principal administration of his estate is that domicil; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt due to him at the time of his death can be brought by an administrator as such in any State in which he has not taken out administration.

But the reason for this last rule is the protection of the rights of citizens of the State in which the suit is brought; and the objection does not rest upon any defect of the administrator's title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

If a debtor, residing in another State, comes into the State in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the debtor, being in that State, is there sued by the administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the State where the debtor resides. *Talmage* v. *Chapel,* 16 Mass. 71; *Biddle* v. *Wilkins,* 1 Pet. 686.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose in action to sue in his own name. *Harper* v. *Butler,* 2 Pet. 239; Shaw, C. J., in *Rand* v. *Hubbard,* 4 Met. 252, 258-260; *Petersen* v. *Chemical Bank,* 32 N. Y. 21. And on a note made to the intestate, payable to bearer, an administrator appointed in one State may sue in his own name in another State. *Barrett* v. *Barrett,* 8 Greenl. 353; *Robinson* v. *Crandall,* 9 Wend. 425.

In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicil of the intestate appeared to have been in Alabama, that the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. *Wilkins* v. *Ellett,* 9 Wall. 740.

The fact that the domicil of the intestate has now been found by the jury to be in Tennessee does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicil; and it has not been suggested that there is any difference between the laws of the two States in that regard.

The judgment must therefore be reversed, and the case remanded with directions to set aside the verdict and to order a

New trial.

JOHNSON v. POWERS, 139 U. S. 156, (1891).

APPEAL from a decree dismissing a bill in equity. The case is stated in the opinion.

Mr. A. H. Garland (with whom was *Mr. H. J. May* on his brief) for appellant. *Mr. Joseph P. Whittemore* filed a brief for same.

Mr. William F. Cogswell for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, filed in the Circuit Court of the United States for the Northern District of New York, by George K. Johnson, a citizen of Michigan, in behalf of himself and of all other persons interested in the administration of the assets of Nelson P. Stewart, late of Detroit in the county of Wayne and State of Michigan, against several persons, citizens of New York, alleged to hold real estate in New York under conveyances made by Stewart in fraud of his creditors.

The bill is founded upon the jurisdiction in equity of the Circuit Court of the United States, independent of statutes or practice in any State, to administer, as between citizens of different States, any deceased person's assets within its jurisdiction. *Payne* v. *Hook*, 7 Wall. 425; *Kennedy* v. *Creswell*, 101 U. S. 641.

At the threshold of the case, we are met by the question whether the plaintiff shows such an interest in Stewart's estate as to be entitled to invoke the exercise of this jurisdiction.

He seeks to maintain his bill, both as administrator, and as a creditor, in behalf of himself and all other creditors of Stewart.

The only evidence that he was either administrator or creditor is a duly certified copy of a record of the probate court of the county of Wayne and State of Michigan, showing his appointment by that court as administrator of Stewart's estate; the subsequent appointment by that court, pursuant to the statutes of Michigan, of commissioners to receive, examine and adjust all claims of creditors against the estate; and the report of those commissioners, allowing several claims, including one to this plaintiff, "George K. Johnson, for judgments against claimant in Wayne Circuit Court as endorser," and naming him as administrator as the party objecting to the allowance of all the claims.

The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either State or national, held in any other State. *Stacy* v. *Thrasher*, 6 How. 44, 58; *Noonan* v. *Bradley*, 9 Wall. 394.

The question remains whether, as against these defendants, the plaintiff has proved himself to be a creditor of Stewart. The only evidence on this point, as already observed, is the record of the proceedings before commissioners appointed by the probate court in Michigan. It becomes necessary therefore to consider the nature and the effect of those proceedings.

They were had under the provisions of the General Statutes of Michigan, (2 Howell's Statutes, §§ 5888-5906,) "the general idea" of which, as stated by Judge Cooley, "is that all claims against the estates of deceased persons shall be duly proved before commissioners appointed to hear them, or before the probate court when no commissioners are appointed. The commissioners act judicially in the allowance of claims, and the administrator cannot bind the estate by admitting their correctness, but must leave them to be proved in the usual mode." *Clark* v. *Davis,* 32 Michigan, 154, 157. The commissioners, when one appointed, become a special tribunal, which, for most purposes, is independent of the probate court, and from which either party may appeal to the circuit court of the county; and, as against an adverse claimant, the administrator, general or special, represents the estate, both before the commissioners and upon the appeal. 2 Howell's Statutes, §§ 5907-5917; *Lothrop* v. *Conely,* 39 Michigan, 757. The decision of the commissioners, or of the circuit court on appeal, should properly be only an allowance or disallowance of the claim, and not in the form of a judgment at common law. *La Roe* v. *Freeland,* 8 Michigan, 530. But, as between the parties to the controversy, and as to the payment of the claim out of the estate in the control of the probate court, it has the effect of a judgment, and cannot be collaterally impeached by either of those parties. *Shurbun* v. *Hooper,* 40 Michigan, 503.

Those statutes provide that, when the administrator declines to appeal from a decision of the commissioners, any person interested in the estate may appeal from that decision to the circuit court; and that, when a claim of the administrator against the estate is disallowed by the commissioners and he appeals, he shall give notice of his appeal to all concerned by personal service or by publication. 2 Howell's Statutes, §§ 5916, 5917. It may well be doubted whether, within the spirit and intent of these provisions, the administrator, when he is also the claimant, is not bound to give notice to other persons interested in the estate, in order that they may have an opportunity to contest his claim before the commissioners; and whether an allowance of his claim, as in this case, in the absence of any impartial representative of the estate, and of other persons interested therein, can be of any binding effect, even in Michigan. See *Lothrop* v. *Conely,* above cited.

But we need not decide that point, because upon broader grounds it is quite clear that those proceedings are incompetent evidence, in this suit and against these defendants, that the plaintiff is a creditor of Stewart or of his estate.

A judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them.

A judgment recovered against the administrator of a deceased person in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Aspden* v. *Nixon,* 4 How. 467; *Stacy* v. *Thrasher,* 6 How. 44; *McLean* v. *Meek,* 18 How. 16; *Low* v. *Bartlett,* 8 Allen, 259.

In *Stacy* v. *Thrasher,* in which a judgment, recovered in one State against an administrator appointed in that State, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the Circuit Court of the United States held within another State against an administrator there appointed of the same intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from:

"The administrator receives his authority from the ordinary, or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction." 6 How. 58.

In answering the objection that to apply these principles to a judgment obtained in another State of the Union would be to deny it the faith and credit, and the effect, to which it was entitled by the Constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject matter when the proceeding was *in rem;* and that the parties to the judgments in question were not the same; neither were they privies, in blood, in law or by estate; and proceeded as follows:

"An administrator under grant of administration in one State stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts." 6 How. 59, 60.

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts; therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem,* and not *in personam,* or that the estate has a sort of corporate entity and unity. But this is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another State, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger." "The laws and courts of a State can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta.* It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel." 6 How. 60, 61.

In *Low* v. *Bartlett,* above cited, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: "The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor." 8 Allen, 266.

In the case at bar, the allowance of Johnson's claim by the commissioners appointed by the probate court in Michigan, giving it the utmost possible effect, faith and credit, yet, if considered as a judgment *in rem,* bound only the assets within the jurisdiction of that court, and, considered as a judgment *inter partes,* bound only the parties to it and their privies. It was not a judgment against Stewart in his lifetime, nor against his estate wherever it might be; but only against his assets and his administrator in Michigan. The only parties to the decision of the commissioners were Johnson, in his personal capacity, as claimant, and Johnson, in his representative capacity, as administrator of those assets, as defendant. The present defendants were not parties to that judgment, nor in privity with Johnson in either capacity. If any other claimant in those proceedings had been the plaintiff here, the allowance of his claim in Michigan would have been no evidence of any debt due to him from the deceased, in this suit brought in New York to recover alleged property of the deceased in New York from third persons, none of whom were parties to those proceedings, or in privity with either party to them. The fact that this plaintiff was himself the only party on both sides of those proceedings cannot, to say the least, give the decision therein any greater effect against these defendants.

The objection is not that the plaintiff cannot maintain this bill without first recovering judgment on his debt in New York, but that there is no evidence whatever of his debt except the judgment in Michigan, and that that judgment, being *res inter alios acta,* is not competent evidence against these defendants.

This objection being fatal to the maintenance of this bill, there is no occasion to consider the other questions, of law or of fact, mentioned in the opinion of the Circuit Court and discussed at the bar.

Decree affirmed.

REYNOLDS v. MC MULLEN, 55 MICH. 568, (1885).

Appeal from Gratiot. (Hart, J.) Oct. 24.—Jan. 14.

FORECLOSURE bill. Defendants appeal. Affirmed.

Smith & Sessions for complainant. A foreign public administrator cannot maintain an action in Michigan: *Goodwin v. Jones,* 3 Mass. 514; *Stearns v. Burnham,* 5 Me. 263; *Vickery v. Beir,* 16 Mich. 50; *Sheldon v. Rice* 30 Mich. 296, 301; *Thayer v. Lane* Walk. Ch. 202; a debt by a citizen of one state to a person domiciled in another is an asset in the former: *McCarty v. Hall* 13 Mo. 480; *Thompson v. Wilson* 2 N. H. 291; *Sabin, Adm'r v. Gilman* 1 N. H. 193; *Young v. O'Neal* 3 Sneed 55; *Taylor v. Barron* 35 N. H. 494; *Vaughn v. Barret* 5 Vt. 333-7; *Bullock v. Rogers* 21 Vt. 294; *Abbott v. Coburn* 28 Vt. 663; *Willard v. Hammond* 21 N. H. 385; *Chapman, Adm'r v. Fish* 6 Hill 554; *Stone v. Scripture* 4 Lans. 186; *Slocum v. Sanford* 2 Conn. 533; *Holcomb v. Phelps* 16 Conn. 127, 135; *Upton v. Hubbard* 28 Conn. 274, 286; *Vaughn v. Northrop* 15 Pet. 1; *Noonan v. Bradley* 9 Wall. 405; *Kohler v. Knapp* 1 Bradf. Sur. 241; *Orcutt v. Orms* 3 Paige 465; *Owen v. Miller* 10 Ohio St. 136; Story's Confl. Laws §§ 514, 411, 529; *Wyman v. United States* 29 Alb. Law Jour. 194; assets are not to be transmitted from one state to another, so long as there are creditors unpaid in the former: Story's Confl. Laws (7th ed.) § 513; *Richards v. Dutch* 8 Mass. 506; *Stevens v. Gaylord* 11 Mass. 256; there is no privity between different administrations in different states, but each is sovereign within its own limits and none have any authority beyond the state where appointed: *Aspden v. Nixon* 4 How. 467; *Stacy v. Thrasher* 6 How. 44; *Mackey v. Coxe* 18 How. 100.

Spaulding & Barker for appellants. The place where a person lives and dies is taken to be his domicile until facts adduced establish the contrary: *In re Olson* 63 Ia. 145; where the St. Louis probate court has jurisdiction of the estates of deceased persons, its orders and judgments are valid till reversed and they are not subject to review collaterally: *Howard v. Moore* 2 Mich. 233; *Palmer v. Oakley* 2 Doug. (Mich.) 475; *Osman v. Traphagen* 23 Mich. 88; *Cook v. Stevenson* 30 Mich. 245; *Schnell v. Chicago* 38 Ill. 382; *Unknown heirs v. Baker, Adm'r* 23 Ill. 435; *Hobson v. Ewan* 62 Ill. 149; *Brackett v. Brackett* 61 Mo. 221; the error or irregularity of proceedings before the surrogate cannot be shown in a collateral action, but must be corrected on appeal: *Jackson v. Robinson* 4 Wend. 436; debts due on simple contract are considered as goods situated where the intestate dies: *Parsons v. Lyman* 20 N. Y. 112; Story on Confl. Laws §§ 376-383; *Eells v. Holder* 2 McCrary 622; a purchaser from a public administrator is not bound to see that the sale is proper; *Sutherland v. Brush* 7 Johns. Ch. 17; he is protected whether the probate court did or did not properly exercise its jurisdiction: *Wight v. Wallbaum* 39 Ill. 565; *Hobson v. Ewan* 62 Ill. 155; *McNamara v. McNamara* 62 Ga. 200.

Cooley, C. J. Some time in the year 1872 Warren A. Sherwood, who had previously been a citizen of Michigan, went to St. Louis, Mo., where he engaged in business. He was a bachelor, and took board at a hotel, and on March 27, 1876, died at the hotel intestate. He left a number of heirs at law, one of whom resided in New York, one in Minnesota, and all the others in Michigan. He left some land in Michigan and some debts, and he was owner at the time of his death of demands to the amount of upwards of $50,000 which were secured by mortgages on lands in Michigan. Among the mortgages was one given to secure a note made October 8, 1874, by William and Mary Lusk, for $1125 and interest, payable at St. Louis, Mo., or at such other place as Sherwood, to whom it was given, should elect in five years from date.

On the death of Sherwood Matrom D. Lewis claiming to act as public administrator for the city and county of St. Louis, took immediate possession of his personal assets, and claimed a right to administer upon them. The relatives of Sherwood were not present at the time, but the residence of those in Michigan was known, and Lewis immediately communicated with them by telegraph, and sent the body to them in compliance with their request. The relatives at once proceeded to have letters of administration taken out in Michigan, and Albert G. Russell, a brother-in-law of the deceased, was appointed administrator by the probate court for the county of Ionia on May 29, 1876, and duly qualified as such. After his appointment and qualification Russell called upon Lewis for the property belonging to the estate, but Lewis refused to surrender it, and persisted in his claim of the right to administer himself. In June, 1878, Lewis made public sale of the securities belonging to the estate, and they were sold for the most part for merely nominal sums. The Lusk note and mortgage, which were perfectly good securities, sold better than most of the others, and were bid off by one Flanagan for eighty dollars. The purchasers were notified before the sale was made that the right of Lewis to sell was disputed, and that Russell as administrator claimed the securities. Flanagan subsequently gave an assignment of the mortgage to one Barr, and Barr executed a discharge of it on receiving six hundred dollars or about one-half the amount due. The defendant McMullen has since become purchaser of the land, and claims to hold and own it discharged of the mortgage. Russell, the Michigan administrator, continued to act as such until September, 1878, when he died, and complainant was appointed and qualified as his successor. The present suit was then instituted, the purpose of which is to foreclose the Lusk mortgage. The defendants rely upon the proceedings by Lewis, the sale to Flanagan, and the subsequent assignment to and discharge by Barr. Decree was rendered in the court below in favor of complainant, and defendants appeal.

It is disputed by complainant that Sherwood at the time of his decease was domiciled in St. Louis, but on the evidence we are inclined to think that city must be deemed to have been his domicile, and we shall so assume throughout this opinion. The questions of importance in the case will then be: *First,* whether Lewis, as public administrator, had authority of law to take upon himself administration of Sherwood's estate; and if so, then *second,* whether under the circumstances he had power as such administrator to sell and assign the mortgage in suit. If either of these questions is answered in the negative, it will be fatal to the defense.

The office of public administrator is statutory in Missouri, and the statute contemplates action by him in the settlement of estates only in a few exceptional cases which are particularly specified. The statutory provision which was in force at the time of Sherwood's death was the following:

"It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons in his county in the following instances:

1. When a stranger dies intestate in the county, without relatives, or dies leaving a will and the executor named is absent or fails to qualify.

2. When persons die intestate without any known heirs.

3. When persons unknown die or are found dead in the county.

4. When money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same.

5. When any estate of any person who dies intestate therein, or elsewhere, is left in the county, liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heir in this state.

6. When from any good cause said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost." Wagner's Stat. 1868, (ed. 1872) p. 122, § 8.

Unless the case was such as to fall within one of these six classes, it is not pretended that Lewis had any right to intermeddle as public administrator.

That Sherwood was not a stranger in St. Louis is conceded. He was well known there, and his name appeared in the directory as a business man of the city. His case did not therefore come within the first subdivision of the section above recited, or within the third.

Sherwood did not die without known heirs. His heirs were well known, and Lewis himself communicated with them immediately. The case was therefore not within the second subdivision above recited.

If Lewis was justified in interfering at all, it must have been under the fourth or fifth subdivisions of the section, and for the protection of the estate. But the fourth could not justify him because the relatives of Sherwood immediately offered to take charge of the estate, and would have done so but for his interference. They did in fact as soon as was practicable take out letters of administration in Michigan where they were particularly needed, and would no doubt have done the same in Missouri had it become necessary. If they had failed to do so, any creditor in Missouri whose claim was not provided for might have taken out letters on his own behalf. No showing is made in the case that for any purpose of protecting the estate it was necessary or important that the public administrator should interfere, and his seizure of the effects and papers of the deceased and the subsequent sale of the assets for a trifling percentage of their value constituted a wholly unnecessary and reckless intermeddling with private rights which the statute of Missouri never intended to authorize, and which the enlightened tribunals of that state must have visited with condemnation had their action been invoked to authorize or sanction what was done. If the public administrator could lawfully administer in defiance of the wishes of the family, he must have had the right in any case in which he could reach the bed of death and seize the personal effects before the family could anticipate him.

We keep in mind the fact, in what we say in this connection, that Lewis was acting on his own motion and without the previous authorization of any court. Had the proper probate court of Missouri, on being applied to, granted letters of administration on the estate of a person who had died when domiciled within the jurisdiction, a collateral attack upon its proceedings could not be countenanced. But this public officer acted without letters and was his own judge of the right to do so. Those who claim under an administration which is not judicially ordered are entitled to no presumptions in support of its authority. *Illinois Cent. R. R. Co. v. Cragin* 71 Ill. 177. In this case the failure to show jurisdiction is complete. There could not well be a more unnecessary, wanton and injurious interference with the rights of others than this record discloses. But we do not place our judgment in this case exclusively upon this ground, because we think if Lewis as public administrator had authority to act, he had none under the facts disclosed to make sale of the mortgage.

We concede to the fullest extent the general principle relied upon by defendants, that personal property, in contemplation of law accompanies the person of the owner, and that its disposition on his death is to be determined by the laws of his domicile. But while the rule of distribution is thus determined, the steps to reach it may be otherwise prescribed; and when the property is in one jurisdiction and the domicile in another, the necessity for distinct proceedings in administration may be imperative. The proceedings when taken in this class of cases are governed and regulated by certain rules of inter-state comity, which are thus stated by the court of appeals of New York: "It is an established doctrine, not only of international law but of the municipal law of this country, that personal property has no locality. It is subject to the law which governs the person of the owner, as well in respect to the disposition of it by act inter vivos, as to its transmission by last will and testament, and by succession upon the owner dying intestate. The principle, no doubt, has its foundation in international comity; but it is equally obligatory, as a rule of decision in the courts, as a legal rule of purely domestic origin. It does not belong to the judges to recognize or to deny the rights which individuals may claim under it, at their pleasure or caprice; but, it having obtained the force of law by user and acquiescence, it belongs only to the political government of the state to change it whenever a change becomes desirable. But the right which an individual may claim to personal property in one country, under title from a person domiciled in another, can only be asserted by the legal instrumentalities which the institutions of the country where the claim is made have provided. The foreign law furnishes the rule of decision as to the validity of the title to the thing claimed; but in respect to the legal assertion of that title it has no extra territorial force. As a result of this doctrine it is now generally held everywhere, and it is well settled in this state, that an executor or administrator appointed in another state has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed." Denio, J. in *Parsons v. Lyman* 20 N. Y. 103, 112; citing *Morrell v. Dickey* 1 Johns. Ch. 153; *Vroom v. Van Horne* 10 Paige 549.

The same general doctrine is also concisely stated in a case in the Federal Supreme Court: "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, de jure, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the intertsts of its own citizens." Story, J. in *Vaughn v. Northrup* 15 Pet. 1, 5.

Lewis, then, if legally administrator in Missouri, had no official authority in this State except such as by comity would be recognized; and the rules of comity might be determined either by usage, of which the judicial decisions would be evidence, or by statute. Some of these rules are general and are well settled. There are cases, for example, where it has been held that a foreign administrator has a right to collect and take possession of personal property, and remove it for the purposes of administration: "*Doolittle v. Lewis* 7 Johns. Ch. 45; *Brown v. Brown* 1 Barb. Ch. 189; *Vroom v. Van Horne* 10 Paige 549; s. c. 42 Am. Dec. 94; *Riley v. Riley* 3 Day 74; s. c. 3 Am. Dec. 262; *Smith v. Guild* 34 Me. 443; *Rand v. Hubbard* 4 Metc. 252; *Marcy v. Marcy* 32 Conn. 308; and where there are no domestic creditors or other claimants, there will be no occasion to question such cases. There may also be cases of payments to a foreign administrator which may be recognized, there being no conflicting administration. *Williams v. Storrs* 6 Johns. Ch. 353; *Trecothick v. Austin* 4 Mas. 16, 33; *Wilkins v. Ellett* 9 Wall. 740; *Vroom v. Van Horne* supra; *Citizens' Bank v. Sharp* 53 Md. 521. And where an administrator, in the forum of his appointment, has assigned demands bona notabilia there, it may be correct to hold that his assignee may sue thereon here in his own name, as was held in *Harper v. Butler* 2 Pet. 239, and *Peterson v. Chemical Bank* 32 N. Y. 21, and cases there cited; as to which see *Knapp v. Lee* 42 Mich. 41.

But this case involves the validity of the assignment of a debt secured by a real-estate mortgage on lands in this State. It was decided in *Cutter v. Davenport* 1 Pick. 81, that the foreign administrator had no authority to make such an assignment; and this is followed in the recent case of *Dial v. Gary* 14 S. C. 573; s. c. 37 Am. Rep. 737. Whether these decisions would be followed in this State if there were no statute bearing upon the question, we do not care to inquire, because we think if the power to assign would exist independent of statute it does not exist under the statutes now in force.

The statutes provide for recognizing the authority of a foreign administrator when it becomes necessary to make sale of lands in this State, and prescribes the steps to be taken for that purpose. How Stat. §§ 6057-6061. If administration is needed in this State for other purposes, new letters must be taken out; and an administration ancillary to one in another state would proceed like any other up to the time of accounting. And for the purpose of selling lands, it seems very clear that a public administrator could not be recognized in this State at all; for the statute contemplates the case of an administrator "appointed" in some other state or country, who shall produce and file in the proper court "an authenticated copy of his appointment.' Section 6057. A public administrator having no appointment for the special case would not be within the terms of this statute.

But we may pass by without further remark any question of what Lewis might or might not have done had he undertaken to proceed in this State under its statutes. What he did in fact was to proceed without regard to the statutes and in contempt of authority which was being taken, in regular form at least, under them. And unless under such circumstances he had authority to sell and dispose of the mortgage in suit, it must have remained the property of the estate.

Now a mortgage of lands is in this State a conveyance within the meaning of the recording laws, and goes upon record as such. How. Stat. § 5689. It becomes necessary to record it, therefore, to prevent its being cut off by subsequent conveyances. Id. § 5683. It is not allowed to be foreclosed under the power of sale until the mortgage and any assignment thereof are duly recorded. Id. § 8498. And no one could make a valid assignment of a mortgage which would be sufficient for the purposes either of foreclosure or of record, unless his own authority was of record so that the title made under a foreclosure would appear by the record to be complete. It follows that a foreign administrator could make no assignment of a mortgage in this State; and this is so well understood that it is not uncommon in this State to have ancillary letters taken out here for no other purpose than to assign mortgage securities. The case of *Doolittle v. Lewis* 7 Johns. Ch. 45, in so far as it recognizes the right of a foreign administrator to foreclose under the power of sale, would be inapplicable in this State by reason of the statutory provisions referred to.

But a foreign administrator would be equally powerless to discharge a mortgage. The discharge is for the purpose of relieving the record of the apparent mortgage lien, and this would not be accomplished unless the authority of the party assuming to discharge was itself of record. The statute imposes a penalty on the mortgagee, his personal representative or assignee who, when payment of the mortgage debt has been made, neglects or refuses, after demand, to discharge the mortgage. How. Stat. § 5704. But a foreign administrator who would be powerless to give a legal discharge could not be within the provisions of this section. Lewis therefore was assuming to sell a mortgage which he was without authority either to enforce or discharge.

But a perfectly conclusive objection to the validity of the sale of the mortgage made by Lewis is seen in the fact that there was at the very time an administration in this State. There is no ground for even a suggestion that that administration was invalid. The intestate left both property and debts in this State, and the jurisdiction of the court which made the Michigan appointment was unquestionable. Administration in Michigan indeed, if the estate was to be preserved from such ruthless destruction as Lewis undertook to visit it with, was a necessity; and if he had had any proper sense of his office and a due regard to the rights of parties concerned, he would have recognized the Michigan administration, and have sought to act in harmony with it. Conflict was for any proper legal purpose wholly unnecessary.

No case has been called to our attention in which it has been held that after letters issued in one state or country a foreign administrator can be recognized there even for the purposes of a voluntary payment; and the cases like *Vaughn v. Barret* 5 Vt. 333; *Young v. O'Neal* 3 Sneed 55 and *Ferguson v. Morris* 67 Ala. 389, which deny the validity of such a payment generally, if questionable when no domestic appointment exists, are perfectly sound and reasonable if there is at the time a valid administration in the state. See *Noonan v. Bradley* 9 Wall. 394. 405. It is the duty of citizens of the state to recognize and defer to the judicial determination of its own tribunals, as much when they concern matters of administration as in other cases: *Henderson v. Clarke* 4 Litt. 277: *Glenn v. Smith* 2 Gill. & J. 493; 20 Am. Dec. 452; and this is especially true in a case like the present where nothing existed to bring in question the judicial determination of the Michigan court, except the bare assertion of his own authority by the foreign official. By the law of this State the title to this demand for all purposes of administration was in the Michigan administrator, who might put it in suit when due or assign it of record or discharge it of record. He was therefore the only person who could be safely dealt with in respect to it. The claim by the foreign official was inconsistent with these undoubted rights and was negatived by them.

The decree must be affirmed.

Campbell, J., concurred.

JUDGMENTS.

HILTON v. GUYOT, 159 U. S. 113, (1895).

The first of these two cases was an action at law, brought December 18, 1885, in the Circuit Court of the United States for the Southern District of New York, by Gustave Bertin Guyot, as official liquidator of the firm of Charles Fortin & Co., and by the surviving members of that firm, all aliens and citizens of the Republic of France, against Henry Hilton and William Libbey, citizens of the United States and of the State of New York, and trading as copartners, in the cities of New York and Paris and elsewhere, under the firm name of A. T. Stewart & Co. The action was upon a judgment recovered in a French court at Paris in the Repuplic of France by the firm of Charles Fortin & Co., all whose members were French citizens, against Hilton and Libbey, trading as copartners as aforesaid, and citizens of the United States and of the State of New York.

The complaint alleged that the judgment of the French court remains in full force and effect; that the French court had jurisdiction of the subject matter, and of the parties; that the plaintiffs have been unable to collect the said judgment or any part thereof, by reason of the absence of the said defendants, they having given up their business in Paris prior to the recovery of the said judgment on appeal, and having left no property within the jurisdiction of the Republic of France, out of which the said judgment might be made; and that there is still justly due and owing from the defendants to the plaintiffs the sum of $195,122.47.

The defendants in their answer alleged that the plaintiffs had no just claim against the defendants; that the defendants were not present at Paris at the time of the suit; and that the defendants appeared by attorney solely for the purpose of protecting their property which was within the jurisdiction of the French court. The answer further alleged that there was not a full and fair trial in the lower French court, and consequently the judgment is void.

The answer further alleged that it would be against natural justice to enforce this judgment without an examination of the merits thereof. The defendants claim also, that judgments rendered in the United States may be examined anew in the French courts, that our judgments are not conclusive in France.

The plaintiffs filed a replication to the answer denying its allegations, and setting up in bar thereof the judgment sued on.

The circuit court directed a verdict for the plaintiffs in the sum of $277,775.44, being the amount of the French judgment and interest. The defendants, having duly excepted to the rulings and direction of the court, sued out a writ of error.

The writ of error in the action at law and the appeal in the suit in equity were argued together in this court January 19, 22, and 23, 1894; and, by direction of the court, were reargued in April, 1894, before a full bench.

Mr. James C. Carter and *Mr. Elihu Root* for plaintiffs in error and appellants. *Mr. Horace Russell* was on their briefs.

Mr. William G. Choate, (with whom was *Mr. William D. Shipman* on the brief,) for defendants in error and appellees.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

These two cases, the one at law and the other in equity, of *Hilton* v. *Guyot,* and the case of *Ritchie* v. *McMullen* which has been under advisement at the same time, present important questions relating to the force and effect of foreign judgments, not hitherto adjudicated by this court, which have been argued with great learning and ability, and which require for their satisfactory determination a full consideration of the authorities. To avoid confusion in indicating the parties, it will be convenient first to take the case at law of *Hilton* v. *Guyot.*

International law, in its widest and most comprehensive sense —including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. *Fremont* v. *United States,* 17 How. 542, 557; *The Scotia,* 14 Wall. 170, 188; *Respublica* v. *De Longchamps,* 1 Dall. 111, 116; *Moultrie* v. *Hunt,* 23 N. Y. 394, 396.

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticised, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, treating of the question in what department of the government of any State, in the absence of any clear declaration of the sovereign will, resides the authority to determine how far the laws of a foreign State shall have effect, and observing that this differs in different States, according to the organization of the departments of the government of each, says: "In England and America, the courts of justice have hitherto exercised the same authority in the most ample manner: and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times as they have arisen; and so far as the practice of nations, or the *jus gentium privatum,* has been supposed to furnish any general principle, it has been followed out." Story's Conflict of Laws, §§ 23, 24.

Afterwards, speaking of the difficulty of applying the positive rules laid down by the Continental jurists, he says that "there is indeed great truth" in these remarks of Mr. Justice Porter, speaking for the Supreme Court of Louisiana: "They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger." Story's Conflict of Laws, § 28; *Saul* v. *His Creditors,* (1827) 5 Martin (N. S.) 569, 596.

Again: Mr. Justice Story says: "It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy, as a matter of paramount moral duty. Now, assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." And, after further discussion of the matter, he concludes: "There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." Story's Conflict of Laws, §§ 33-38.

Chief Justice Taney, likewise, speaking for this court while Mr. Justice Story was a member of it, and largely adopting his words, said: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned." "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations." "It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided." *Bank of Augusta* v. *Earle,* (1839) 13 Pet. 519, 589; Story's Conflict of Laws, § 38.

Mr. Wheaton says: "All the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State." "The express consent of a State, to the application of foreign laws within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists. There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States—*ex comitate, ob reciprocam utilitatem.*" Wheaton's International Law, (8th ed.) §§ 78, 79. "No sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable. The general comity, utility and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries." § 147.

Chancellor Kent says: "The effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty." 2 Kent Com. (6th ed.) 120.

In order to appreciate the weight of the various authorities cited at the bar, it is important to distinguish different kinds of judgments. Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

A judgment *in rem,* adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding *in rem,* is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of a former owner is lost, and a complete title given to the person who claims under the decree. No court of coordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coordinate tribunal is capable of making the inquiry." *Williams* v. *Armroyd,* 7

Cranch, 423, 432. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. *Croudson* v. *Leonard,* 4 Cranch, 434; *Williams* v. *Armroyd,* above cited; *Ludlow* v. *Dale,* 1 Johns. Cas. 16. But the same rule applies to judgments *in rem* under municipal law. *Hudson* v. *Guestier,* 4 Cranch, 293; *Ennis* v. *Smith,* 14 How. 400, 430; *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 265, 291; *Scott* v. *McNeal,* 154 U. S. 34, 46; *Castrique* v. *Imrie,* L. R. 4 H. L. 414; *Monroe* v. *Douglas,* 4 Sandf. Ch. 126.

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. *Cottington's case,* 2 Swanston, 326; *Roach* v. *Garvan,* 1 Ves. Sen. 157; *Harvey* v. *Farnie,* 8 App. Cas. 43; *Cheely* v. *Clayton,* 110 U. S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in *Cottington's case,* above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."

Other judgments, not strictly *in rem,* under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. Story on Conflict of Laws, (2d ed.) § 592 *a.* And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." *Gold* v. *Canham,* (1689) 2 Swanston, 325; *S. C.* 1 Cas. in Ch. 311. See also *Tarleton* v. *Tarleton,* 4 M. & S. 20; *Konitzky* v. *Meyer,* 49 N. Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. Story's Conflict of Laws, §§ 330-341; *May* v. *Breed,* 7 Cush. 15. Such was the case, cited at the bar, of *Burroughs* or *Burrows* v. *Jamineau* or *Jemino,* Mosely, 1; *S. C.* 2 Stra. 733; 2 Eq. Cas. Ab. 525, pl. 7; 12 Vin. Ab. 87, pl. 9; Sel. Cas. in Ch. 69; 1 Dickens, 48.

In that case, bills of exchange, drawn in London, were negotiated, indorsed and accepted at Leghorn in Italy, by the law of which an acceptance became void if the drawer failed without leaving effects in the acceptor's hands. The acceptor, accordingly, having received advices that the drawer had failed before the acceptances, brought a suit at Leghorn against the last endorsees, to be discharged of his acceptances, paid the money into court and obtained a sentence there, by which the acceptances were vacated as against those indorsees and all the indorsers and negotiators of the bills, and the money deposited was returned to him. Being afterwards sued at law in England by subsequent holders of the bills, he applied to the Court of Chancery and obtained a perpetual injunction. Lord Chancellor King, as reported by Strange, "was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated, and the plaintiff's acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that sentence was conclusive and bound the Court of Chancery here;" as reported in Viner, that "the court at Leghorn had jurisdiction of the thing, and of the persons;" and, as reported by Mosely, that, though "the last indorsees had the sole property of the bills, and were therefore made the only parties to the suit at Leghorn, yet the sentence made the acceptance void against the now defendants and all others." It is doubtful, at the least, whether such a sentence was entitled to the effect given to it by Lord Chancellor King. See *Novelli* v. *Rossi,* 2 B. & Ad. 757; *Castrique* v. *Imrie,* L. R. 4 H. L. 414, 435; 2 Smith's Lead. Cas. (2d ed.) 450.

The remark of Lord Hardwicke, *arguendo,* as Chief Justice, in *Boucher* v. *Lawson,* (1734) that "the reason gone upon by Lord Chancellor King, in the case of *Burroughs* v. *Jamineau,* was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts," evidently had reference, as the context shows, to judgments of a court having jurisdiction of the thing; and did not touch the effect of an executory judgment for a debt. Cas. temp. Hardw. 85, 89; *S. C.* Cunningham, 144, 148.

In former times, foreign decrees in admiralty *in personam* were executed, even by imprisonment of the defendant, by the Court of Admiralty in England, upon letters rogatory from the foreign sovereign, without a new suit. Its right to do so was recognized by the Court of King's Bench in 1607 in a case of *habeas corpus,* cited by the plaintiffs, and reported as follows: "If a man of Frizeland sues an Englishman in Frizeland before the Governor there, and there recovers against him a certain sum; upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the Governor sends his letters missive into England, *omnes magistratus infra regnum Angliae rogans,* to make execution of the said judgment. The Judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of England takes notice of this law, and the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B. R., *Weir's case,* resolved upon an *habeas corpus,* and remanded." 1 Rol. Ab. 530, pl. 12; 6 Vin. Ab. 512, pl. 12. But the only question there raised or decided was of the power of the English Court of Admiralty, and not of the conclusiveness of the foreign sentence; and in later times the mode of enforcing a foreign decree in admiralty is by a new libel. See *The City of Mecca,* 5 P. D. 28, and 6 P. D. 106.

The extraterritorial effect of judgments *in personam,* at law or in equity, may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. *Ricardo* v. *Garcias,* 12 Cl. & Fin. 368; *The Griefswald,* Swabey, 430, 435; *Barber* v. *Lamb,* 8 C. B. (N. S.) 95; *Lea* v. *Deakin,* 11 Bissell, 23.

The effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country—as is the case now before us—presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century, it was settled in England that a foreign judgment on a debt was considered not, like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed; but as a simple contract only.

* * * * * * * * * * * * * *

The English cases, above referred to, have been stated with the more particularity and detail, because they directly bear upon the question what was the English law, being then our own law, before the Declaration of Independence. They demonstrate that by that law, as generally understood, and as declared by Hardwicke, Mansfield, Buller, Camden, Eyre and Ellenborough, and doubted by Kenyon only, a judgment recovered in a foreign country for a sum of money, when sued upon in England, was only *prima facie* evidence of the demand, and subject to be examined and impeached. The law of England, since it has become to us a foreign country, will be considered afterwards.

The law upon this subject, as understood in the United States, at the time of their separation from the mother country, was clearly set forth by Chief Justice Parsons, speaking for the Supreme Judicial Court of Massachusetts, in 1813, and by Mr. Justice Story in his Commentaries on the Constitution of the United States, published in 1833. Both those eminent jurists declared that by the law of England the general rule was that foreign judgments were only *prima facie* evidence of the matter which they purported to decide; and that by the common law, before the American Revolution, all the courts of the several Colonies and States were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another Colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England. And they noted that, in order to remove that inconvenience, statutes had been passed in Massachusetts, and in some of the other Colonies, by which judgments rendered by a court of competent jurisdiction in a neighboring Colony could not be impeached. *Bissell* v. *Briggs,* 9 Mass. 462, 464, 465; Mass Stat. 1773-4, c. 16, 5 Prov. Laws, 323, 369; Story on the Constitution, (1st ed.) §§ 1301, 1302; (4th ed.) §§ 1306, 1307.

It was because of that condition of the law, as between the American Colonies and States, that the United States, at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the States of the Union in the courts of another of those States.

By the Articles of Confederation of 1777, art. 4, § 3, "Full faith and credit shall be given, in each of these States, to the records, acts and judicial proceedings of the courts and magistrates of every other State." 1 Stat. 4. By the Constitution of the United States, art. 4, § 1, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." And the first Congress of the United States under the Constitution, after prescribing the manner in which the records and judicial proceedings of the courts of any State should be authenticated and proved, enacted that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905.

The effect of these provisions of the Constitution and laws of the United States was at first a subject of diverse opinions, not only in the courts of the several States, but also in the Circuit Courts of the United States; Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Washington holding that judgments of the courts of a State had the same effect throughout the Union as within that State; but Chief Justice Marshall (if accurately reported) being of opinion that they were not entitled to conclusive effect, and that their consideration might be impeached. *Armstrong* v. *Carson,* (1794) 2 Dall. 302; *Green* v. *Sarmiento,* (1811) 3 Wash. C. C. 17, 21; *S. C.* Pet. C. C. 74, 78; *Peck* v. *Williamson,* (reported as in November, 1813, apparently a mistake for 1812,) 1 Carolina Law Repository, 53.

The decisions of this court have clearly recognized that judgments of a foreign state are *prima facie* evidence only, and that, but for these constitutional and legislative provisions, judgments of a State of the Union, when sued upon in another State, would have no greater effect.

In *Croudson* v. *Leonard,* (1808) in which this court held that the sentence of a foreign court of admiralty *in rem,* condemning a vessel for breach of blockade, was conclusive evidence of that fact in an action on a policy of insurance, Mr. Justice Washington, after speaking of the conclusiveness of domestic judgments generally, said: "The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is *prima facie* evidence. But it is to be remarked, that in such a case, the judgment is no more conclusive as to the right it establishes, than as to the fact it decides." 4 Cranch, 434, 442.

In *Mills* v. *Duryee,* (1813) in which it was established that, by virtue of the Constitution and laws of the United States, the judgment of a court of one of the States was conclusive evidence, in every court within the United States, of the matter adjudged; and therefore *nul tiel record,* and not *nil debet,* was a proper plea to an action brought in a court of the United States in the District of Columbia upon a judgment recovered in a court of the State of New York; this court, speaking by Mr. Justice Story, said: "The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record;* and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences." "Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect." 7 Cranch, 481, 484, 485.

In *Hampton* v. *McConnel,* (1818) the point decided in *Mills* v. *Duryee* was again adjudged, without further discussion, in an opinion delivered by Chief Justice Marshall. 3 Wheat. 234.

The *obiter dictum* of Mr. Justice Livingston in *Hopkins* v. *Lee,* (1821) 6 Wheat. 109. 114, repeated by Mr. Justice Daniel in *Pennington* v. *Gibson,* (1853) 16 How. 65, 78, as to the general effect of foreign judgments, has no important bearing upon the case before us.

In *McElmoyle* v. *Cohen,* (1839) Mr. Justice Wayne, discussing the effect of the act of Congress of 1790, said, that "the adjudications of the English courts have now established the rule to be, that foreign judgments are *prima facie* evidence of the right and matter they purport to decide." 13 Pet. 312, 325.

In *D'Arcy* v. *Ketchum,* (1850) in which this court held that the provisions of the Constitution and laws of the United States gave no effect in one State to judgments rendered in another State by a court having no jurisdiction of the cause or of the parties, Mr. Justice Catron said: "In construing the act of 1790, the law as it stood when the act was passed must enter into that construction; so that the existing defect in the old law may be seen, and its remedy by the act of Congress comprehended. Now it was most reasonable, on general principles of comity and justice, that, among States and their citizens united as ours are, judgments rendered in one should bind citizens of other States, where defendants had been served with process, or voluntarily made defence. As these judgments, however, were only *prima facie* evidence, and subject to be inquired into by plea, when sued on in another State, Congress saw proper to remedy the evil, and to provide that such inquiry and double defence should not be allowed. To this extent, it is declared in the case of *Mills* v. *Duryee,* Congress has gone in altering the old rule." 11 How. 165, 175, 176.

In *Christmas v. Russell,* (1866) in which this court decided that, because of the Constitution and laws of the United States, a judgment of a court of one State of the Union, when sued upon in a court of another, could not be shown to have been procured by fraud, Mr. Justice Clifford, in delivering the opinion, after stating that, under the rules of the common law, a domestic judgment, rendered in a court of competent jurisdiction, could not be collaterally impeached or called in question, said: "Common law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules, a foreign judgment was *prima facie* evidence of the debt, and it was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained." 5 Wall. 290, 304.

In *Bischoff* v. *Wethered,* (1869) in an action on an English judgment rendered without notice to the defendant, other than by service on him in this country, this court, speaking by Mr. Justice Bradley, held that the proceeding in England "was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a *prima facie* character." 9 Wall. 812, 814.

In *Hanley* v. *Donoghue,* (1885) 116 U. S. 1, 4, and in *Wisconsin* v. *Pelican Ins. Co.,* (1888) 127 U. S. 265, 292, it was said that judgments recovered in one State of the Union, when proved in the courts of another, differed from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.

But neither in those cases, nor in any other, has this court hitherto been called upon to determine how far foreign judgments may be re-examined upon their merits, or be impeached for fraud in obtaining them.

In the courts of the several States, it was long recognized and assumed, as undoubted and indisputable, that by our law, as by the law of England, foreign judgments for debts were not conclusive, but only *prima facie* evidence of the matter adjudged. Some of the cases are collected in the margin.

In the leading case of *Bissell v. Briggs,* above cited, Chief Justice Parsons said: "A foreign judgment may be produced here by a party to it, either to justify himself by the execution of that judgment in the country in which it was rendered, or to obtain the execution of it from our courts." "If the foreign court rendering the judgment had jurisdiction of the cause, yet the courts here will not execute the judgment, without first allowing an inquiry into its merits. The judgment of a foreign court, therefore, is by our laws considered only as presumptive evidence of a debt, or as *prima facie* evidence of a sufficient consideration of a promise, where such court had jurisdiction of the cause; and if an action of debt be sued on any such judgment, *nil debet* is the general issue; or, if it be made the consideration of a promise, the general issue is *non assumpsit.* On these issues, the defendant may impeach the justice of the judgment, by evidence relative to that point. On these issues, the defendant may also, by proper evidence, prove that the judgment was rendered by a foreign court, which had no jurisdiction; and if his evidence be sufficient for this purpose, he has no occasion to impeach the justice of the judgment." 9 Mass. 463, 464.

In a less known case, decided in 1815, but not published until 1879, the reasons for this view were forcibly stated by Chief Justice Jeremiah Smith, speaking for the Supreme Court of New Hampshire, as follows:

"The respect which is due to judgments, sentences and decrees of courts in a foreign State, by the law of nations, seems to be the same which is due to those of our own courts. Hence the decree of an admiralty court abroad is equally conclusive with decrees of our admiralty courts. Indeed, both courts proceed by the same rule, are governed by the same law—the maritime law of nations: Coll. Jurid. 100; which is the universal law of nations, except where treaties alter it.

"The same comity is not extended to judgments or decrees which may be founded on the municipal laws of the State in which they are pronounced, Independent States do not choose to adopt such decisions without examination. These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself. Wherever, then, the court may have proceeded on municipal law, the rule is, that the judgments are not conclusive evidence of debt, but *prima facie* evidence only. The proceedings have not the conclusive quality which is annexed to the records or proceedings of our own courts, where we approve both of the rule and of the judges who interpret and apply it. A foreign judgment may be impeached; defendant may show that it is unjust, or that it was irregularly or unduly obtained. Doug. 5, note. *Bryant* v. *Ela,* Smith (N. H.) 396, 404.

From this review of the authorities, it clearly appears that, at the time of the separation of this country from England, the general rule was fully established that foreign judgments *in personam* were *prima facie* evidence only, and not conclusive of the merits of the controversy between the parties. But the extent and limits of the application of that rule do not appear to have been much discussed, or defined with any approach to exactness, in England or America, until the matter was taken up by Chancellor Kent and by Mr. Justice Story.

In *Taylor* v. *Bryden,* (1811) an action of assumpsit, brought in the Supreme Court of the State of New York, on a judgment obtained in the State of Maryland against the defendant as indorser of a bill of exchange, and which was treated as a foreign judgment, so far as concerned its effect in New York, (the decision of this court to the contrary in *Mills* v. *Duryee,* 7 Cranch, 481, not having yet been made,) Chief Justice Kent said: "The judgment in Maryland is presumptive evidence of a just demand; and it was incumbent upon the defendant, if he would obstruct the execution of the judgment here, to show, by positive proof, that it was irregularly or unduly obtained." "To try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other States, and would be carrying the doctrine of re-examination to an oppressive extent. It would be the same as granting a new trial in every case, and upon every question of fact. Suppose a recovery in another State, or in any foreign court, in an action for a tort, as for an assault and battery, false imprisonment, slander, etc., and the defendant was duly summoned and appeared, and made his defence, and the trial was conducted orderly and properly, according to the rules of a civilized jurisprudence, is every such case to be tried again here on the merits? I much doubt whether the rule can ever go to this length. The general language of the books is that the defendant must impeach the judgment by showing affirmatively that it was unjust by being irregularly or unfairly procured." But the case was decided upon the ground that the defendant had done no more than raise a doubt of the correctness of the judgment sued on. 8 Johns. 173, 177, 178.

Chancellor Kent, afterwards, treating of the same subject in the first edition of his Commentaries, (1827) put the right to impeach a foreign judgment somewhat more broadly, saying: "No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by a suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment [for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty]. In the former case, [of a suit to enforce a foreign judgment,] the rule is, that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt; and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained. This was the principle declared and settled by the House of Lords, in 1771, in the case of *Sinclair* v. *Fraser,* upon an appeal from the Court of Session in Scotland." In the second edition, (1832) he inserted the passages above printed in brackets; and in a note to the fourth edition, (1840) after citing recent conflicting opinions in Great Britain, and referring to Mr. Justice Story's reasoning in his Commentaries on the Conflict of Laws, § 607, in favor of the conclusiveness of foreign judgments, he added, "and that is certainly the more convenient and the safest rule, and the most consistent with sound principle, except in cases in which the court which pronounced the judgment has not due jurisdiction of the case, or of the defendant, or the proceeding was in fraud, or founded in palpable mistake or irregularity, or bad by the law of the *rei judicatae;* and in all such cases the justice of the judgment ought to be impeached." 2 Kent Com. (1st ed.) 102; (later eds.) 120.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, first published in 1834, after reviewing many English authorities, said, "The present inclination of the English courts seems to be to sustain the conclusiveness of foreign judgments"—to which, in the second edition in 1841, he added, "although certainly there yet remains no inconsiderable diversity of opinion among the learned judges of the different tribunals." § 606.

He then proceeded to state his own view of the subject, on principle, saying: "It is, indeed, very difficult to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex aequo et bono?* Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular and bad by the local law, *fori rei judicatae.* To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits." § 607.

He then observed: "The general doctrine maintained in the American courts in relation to foreign judgments certainly is that they are *prima facie* evidence, but that they are impeachable. But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn." § 608.

After stating the effect of the Constitution of the United States, and referring to the opinions of some foreign jurists, and to the law of France, which allows the merits of foreign judgments to be examined, Mr. Justice Story concluded his treatment of the subject as follows: "It is difficult to ascertain what the prevailing rule is in regard to foreign judgments in some of the other nations of continental Europe; whether they are deemed conclusive evidence, or only *prima facie* evidence. Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." § 618.

In *Bradstreet* v. *Neptune Ins. Co.*, (1839) in the Circuit Court of the United States for the District of Massachusetts, Mr. Justice Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice." 3 Sumner, 600, 608, 609.

In *Burnham* v. *Webster*, (1845) in an action of assumpsit upon a promissory note, brought in the Circuit Court of the United States for the District of Maine, the defendant pleaded a former judgment in the Province of New Brunswick in his favor in an action there brought by the plaintiff; the plaintiff replied that the note was withdrawn from that suit, by consent of parties and leave of the court, before verdict and judgment; and the defendant demurred to the replication. Judge Ware, in overruling the demurrer, said: "Whatever difference of opinion there may be as to the binding force of foreign judgments, all agree that they are not entitled to the same authority as the judgments of domestic courts of general jurisdiction. They are but evidence of what they purport to decide, and liable to be controlled by counter evidence, and do not, like domestic judgments, import absolute verity and remain incontrovertible and conclusive until reversed." And he added that, if the question stood entirely clear from authority, he should be of opinion that the plaintiff could not be allowed to deny the validity of the proceedings of a court whose authority he had invoked. 2 Ware, 236, 239, 241.

At a subsequent trial of that case before a jury, (1846) 1 Woodb. & Min. 172, the defendant proved the judgment in New Brunswick. The plaintiff then offered to prove the facts stated in his replication, and that any entry on the record of the judgment in New Brunswick concerning this note was therefore by mistake or inadvertence. This evidence was excluded, and a verdict taken for the plaintiff, subject to the opinion of the court. Mr. Justice Woodbury, in granting a new trial, delivered a thoughtful and discriminating opinion upon the effect of foreign judgments, from which the following passages are taken:

"They do, like domestic ones, operate conclusively, *ex proprio vigore,* within the governments in which they are rendered, but not elsewhere. When offered and considered elsewhere, they are, *ex comitate,* treated with respect, according to the nature of the judgment, and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract, and hence to be respected elsewhere by analogy according to the *lex loci contractus.* With these views, I would go to the whole extent of the cases decided by Lord Mansfield and Buller; and where the foreign judgment is not *in rem,* as it is in admiralty, having the subject-matter before the court, and acting on that rather than the parties, I would consider it only *prima facie* evidence as between the parties to it." p. 175.

"By returning to that rule, we are enabled to give parties, at times, most needed and most substantial relief, such as in judgments abroad against them without notice, or without a hearing on the merits, or by accident or mistake of facts, as here, or on rules of evidence and rules of law they never assented to, being foreigners and their contracts made elsewhere, but happening to be travelling through a foreign jurisdiction, and being compelled *in invitum* to litigate there." p. 177.

"Nor would I permit the *prima facie* force of the foreign judgment to go far, if the court was one of a barbarous or semi-barbarous government, and acting on no established principles of civilized jurisprudence, and not resorted to willingly by both parties, or both not inhabitants and citizens of the country. Nor can much comity be asked for the judgments of another nation, which, like France, pays no respect to those of other countries—except, as before remarked, on the principle of the parties belonging there, or assenting to a trial there." p. 179.

"On the other hand, by considering a judgment abroad as only *prima facie* valid, I would not allow the plaintiff abroad, who had sought it there, to avoid it, unless for accident or mistake, as here. Because, in other respects, having been sought there by him voluntarily, it does not lie in his mouth to complain of it. Nor would I in any case permit the whole merits of the judgment recovered abroad to be put in evidence as a matter of course; but being *prima facie* correct, the party impugning it, and desiring a hearing of its merits, must show first, specifically, some objection to the judgment's reaching the merits, and tending to prove they had not been acted on; or [as?] by showing there was no jurisdiction in the court, or no notice, or some accident or mistake, or fraud, which prevented a full defence, and has entered into the judgment; or that the court either did not decide at all on the merits, or was a tribunal not acting in conformity to any set of legal principles, and was not willingly recognized by the party as suitable for adjudicating on the merits. After matters like these are proved, I can see no danger, but rather great safety in the administration of justice, in permitting, to every party before us, at least one fair opportunity to have the merits of his case fully considered, and one fair adjudication upon them, before he is estopped forever." p. 180.

In *De Brimont* v. *Penniman,* (1873) in the Circuit Court of the United States for the Southern District of New York, Judge Woodruff said: "The principle on which foreign judgments receive any recognition from our courts is one of comity. It does not require, but rather forbids it, where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens." And he declined to maintain an action against a citizen of the United States (whose daughter had been married in France to a French citizen) upon a decree of a French court requiring the defendant, then resident in France and duly served with process there, to pay an annuity to his son-in-law. 10 Blatchford, 436, 441.

Mr. Justice Story and Chancellor Kent, as appears by the passages above quoted from their commentaries, concurred in the opinion that, in a suit upon a foreign judgment, the whole merits of the case could not, as matter of course, be re-examined anew; but that the defendant was at liberty to impeach the judgment, not only by showing that the court had no jurisdiction of the case, or of the defendant, but also by showing that it was procured by fraud, or was founded on clear mistake or irregularity, or was bad by the law of the place where it was rendered. Story's Conflict of Laws, § 607; 2 Kent Com. (6th ed.) 120.

The word "mistake" was evidently used by Story and Kent, in this connection, not in its wider meaning of error in judgment, whether upon the law or upon the facts; but in the stricter sense of misapprehension or oversight, and as equivalent to what, in *Burnham* v. *Webster,* before cited, Mr. Justice Woodbury spoke of as "some objection to the judgment's reaching the merits, and tending to prove that they had not been acted on;" "some accident or mistake," or "that the court did not decide at all on the merits." 1 Woodb. & Min. 180.

The suggestion that a foreign judgment might be impeached for error in law of the country in which it was rendered is hardly consistent with the statement of Chief Justice Marshall, when, speaking of the disposition of this court to adopt the construction given to the laws of a State by its own courts, he said: "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute." *Elmendorf* v. *Taylor,* (1825) 10 Wheat. 152, 159, 160.

In recent times, foreign judgments rendered within the dominions of the English Crown, and under the law of England, after a trial on the merits, and no want of jurisdiction, and no fraud or mistake, being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine and Illinois. *Lazier* v. *Wescott,* (1862) 26 N. Y. 146, 150; *Dunstan* v. *Higgins,* (1893) 138 N. Y. 70, 74; *Rankin* v. *Goddard,* (1866) 54 Maine, 28, and (1868) 55 Maine, 389; *Baker* v. *Palmer,* (1876) 83 Illinois, 568. In two early cases in Ohio, it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. *Silver Lake Bank* v. *Harding,* (1832) 5 Ohio, 545, 547; *Anderson* v. *Anderson,* (1837) 8 Ohio, 108, 110. But in a later case in that State it was said that they were only *prima facie* evidence of indebtedness. *Pelton* v. *Platner,* (1844) 13 Ohio, 209, 217. In *Jones* v. *Jamison,* (1860) 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff.

The result of the modern decisions in England, after much diversity, not to say vacillation of opinion, does not greatly differ (so far as concerns the aspects in which the English courts have been called upon to consider the subject) from the conclusions of Chancellor Kent and of Justices Story and Woodbury.

At one time, it was held that, in an action brought in England upon a judgment obtained by the plaintiff in a foreign country, the judgment must be assumed to be according to the law of that country, unless the contrary was clearly proved—manifestly implying that proof on that point was competent. *Becquet* v. *McCarthy,* (1831) 2 B. & Ad. 951, 957; *Alivon* v. *Furnival,* (1834) 1 Cr., M. & R. 277, 293; *S. C.* 4 Tyrwh. 751, 768.

Lord Brougham, in the House of Lords, as well as Chief Justice Tindal and Chief Justice Wilde (afterwards Lord Chancellor Truro) and their associates, in the Common Bench, considered it to be well settled that an Irish or Colonial judgment, or a foreign judgment, was not, like a judgment of a domestic court of record, conclusive evidence, but only, like a simple contract, *prima facie* evidence of a debt. *Houlditch* v. *Donegal,* (1834) 8 Bligh N. R. 301, 346; *S. C.* 2 Cl. & Fin. 470, 476-479; *Don* v. *Lippmann,* (1837) 5 Cl. & Fin. 1, 20-22; *Smith* v. *Nichols,* (1839) 7 Scott, 147, 166-170; *S. C.* 5 Bing. N. C. 208, 220-226; 7 Dowl. 282; *Bank of Australasia* v. *Harding,* (1850) 9 C. B. 661, 686, 687.

On the other hand, Vice Chancellor Shadwell, upon an imperfect review of the early cases, expressed the opinion that a foreign judgment was conclusive. *Martin* v. *Nicolls,* (1830) 3 Sim. 458.

Like opinions were expressed by Lord Denman, speaking for the Court of Queen's Bench, and by Vice Chancellor Wigram, in cases of Irish or Colonial judgments, which were subject to direct appellate review in England. *Ferguson* v. *Mahon,* (1839) 11 Ad. & El. 179, 183; *S. C.* 3 Per. & Dav. 143, 146; *Henderson* v. *Henderson,* (1844), 6 Q. B. 288, 298, 299; *Henderson* v. *Henderson,* (1843) 3 Hare, 100, 118.

In *Bank of Australasia* v. *Nias,* (1851) in an action upon an Australian judgment, pleas that the original promises were not made, and that those promises, if made, were obtained by fraud, were held bad on demurrer. Lord Campbell, in delivering judgment, referred to Story on the Conflict of Laws, and adopted substantially his course of reasoning in § 607, above quoted, with regard to foreign judgments. But he distinctly put the decision upon the ground that the defendant might have appealed to the Judicial Committee of the Privy Council, and thus have procured a review of the colonial judgment. And he took the precaution to say: "How far it would be permitted to a defendant to impeach the competency, or the integrity, of a foreign court from which there was no appeal, it is unnecessary here to inquire." 16 Q. B. 717, 734-737.

The English courts, however, have since treated that decision as establishing that a judgment of any competent foreign court could not, in an action upon it, be questioned, either because that court had mistaken its own law, or because it had come to an erroneous conclusion upon the facts. *De Cosse Brissac* v. *Rathbone,* (1861) 6 H. & N. 301; *Scott* v. *Pilkington,* (1862) 2 B. & S. 11, 41, 42; *Vanquelin* v. *Bouard,* (1863) 15 C. B. (N. S.) 341, 368; *Castrique* v. *Imrie,* (1870) L. R. 4 H. L. 414, 429, 430; *Godard* v. *Gray,* (1870) L. R. 6 Q. B. 139, 150; *Ochsenbein* v. *Papelier,* (1873) L. R. 8 Ch. 695, 701. In *Meyer* v. *Ralli,* (1876) a judgment *in rem,* rendered by a French court of competent jurisdiction, was held to be re-examinable upon the merits, solely because it was admitted by the parties, in the special case upon which the cause was submitted to the English court, to be manifestly erroneous in regard to the law of France. 1 C. P. D. 358.

In view of the recent decisions in England, it is somewhat remarkable that, by the Indian Code of Civil Procedure of 1877, "no foreign judgment" (which is defined as a judgment of "a civil tribunal beyond the limits of British India, and not having authority in British India, nor established by the Governor General in Council") "shall operate as a bar to a suit in British India," "if it appears on the face of the proceeding to be founded on an incorrect view of international law," or "if it is, in the opinion of the court before which it is produced, contrary to natural justice." Piggott on Foreign Judgments, (2d ed.) 380, 381.

It was formerly understood in England that a foreign judgment was not conclusive, if it appeared upon its face to be founded on a mistake or disregard of English law. *Arnott* v. *Redfern,* (1825-6) 2 Car. & P. 88, and 3 Bing. 353; *S. C.* 11 J. B. Moore, 209; *Novelli* v. *Rossi,* (1831) 2 B. & Ad. 757; 3 Burge on Colonial and Foreign Laws, 1065; 2 Smith's Lead. Cas. (2d ed.) 448; *Reimers* v. *Druce,* (1856) 23 Beavan, 145.

In *Simpson* v. *Fogo,* (1860) 1 Johns. & Hem. 18, and (1862), 1 Hem. & Mil. 195, Vice-Chancellor Wood (afterwards Lord Hatherley) refused to give effect to a judgment *in personam* of a court in Louisiana, which had declined to recognize the title of a mortgagee of an English ship under the English law. In delivering judgment upon demurrer, he said: "The State of Louisiana may deal as it pleases with foreign law; but if it asks courts of this country to respect its law, it must be on a footing of paying a like respect to ours. Any comity between the courts of two nations holding such opposite doctrines as to the authority of the *lex loci* is impossible. While the courts of Louisiana refuse to recognize a title acquired here which is valid according to our law, and hand over to their own citizens property so acquired, they cannot at the same time expect us to defer to a rule of their law which we are no more bound to respect than a law that any title of foreigners should be disregarded in favor of citizens of Louisiana. The answer to such a demand must be, that a country which pays so little regard to our laws, as to set aside a paramount title acquired here, must not expect at our hands any greater regard for the competing title so acquired by the citizens of that country." 1 Johns. & Hem. 28, 29. And upon motion for a decree, he elaborated the same view, beginning by saying, "Whether this judgment does so err or not against the recognized principles of what has been commonly called the comity of nations, by refusing to regard the law of the country where the title to the ship was acquired, is one of the points which I have to consider;" and concluding that it was "so contrary to law, and to what is required by the comity of nations," that he must disregard it. 1 Hem. & Mil. 222-247. See also *Liverpool Co.* v. *Hunter,* (1867) L. R. 4 Eq. 62, 68, and (1868) L. R. 3 Ch. 479, 484.

In *Scott* v. *Pilkington,* (1862) Chief Justice Cockburn treated it as an open question whether a judgment recovered in New York for a debt could be impeached on the ground that the record showed that the foreign court ought to have decided the case according to English law, and had either disregarded the comity of nations by refusing to apply the English law, or erred in its view of English law. 2 B. & S. 11, 42. In *Castrique* v. *Imrie,* (1870) the French judgment which was adjudged not to be impeachable for error in law, French or English, was, as the House of Lords construed it, a judgment *in rem,* under which the ship to which the plaintiff in England claimed title had been sold. L. R. 4 H. L. 414. In *Godard* v. *Gray,* (1870) shortly afterwards, in which the Court of Queen's Bench held that a judgment *in personam* of a French court could not be impeached because it had put a construction erroneous, according to English law, upon an English contract, the decision was put by Justices Blackburn and Mellor upon the ground that it did not appear that the foreign court had "knowingly and perversely disregarded the rights given by the English law;" and by Justice Hannen, solely upon the ground that the defendant did not appear to have brought the English law to the knowledge of the foreign court. L. R. 6 Q. B. 139, 149, 154. In *Messina* v. *Petrococchino,* (1872) Sir Robert Phillimore, delivering judgment in the Privy Council, said: "A foreign judgment of a competent court may indeed be impeached, if it carries on the face of it a manifest error." L. R. 4 P. C. 144, 157.

The result of the English decisions, therefore, would seem to be that a foreign judgment *in personam* may be impeached for a manifest and wilful disregard of the law of England.

Lord Abinger, Baron Parke and Baron Alderson were wont to say that the judgment of a foreign court of competent jurisdiction for a sum certain created a duty or legal obligation to pay that sum; or, in Baron Parke's words, that the principle on which the judgments of foreign and colonial courts are supported and enforced was, "that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." *Russell* v.

Smyth, (1842) 9 M. & W. 810, 818, 819; *Williams* v. *Jones,* (1845) 13 M. & W. 628, 633, 634.

But this was said in explaining why, by the technical rules of pleading, an action of assumpsit, or of debt, would lie upon a foreign judgment; and had no reference to the question how far such a judgment was conclusive of the matter adjudged. At common law, an action of debt would lie on a debt appearing by a record, or by any other specialty, such as a contract under seal; and would also lie for a definite sum of money due by simple contract. Assumpsit would not lie upon a record or other specialty; but would lie upon any other contract, whether expressed by the party, or implied by law. In an action upon a record, or upon a contract under seal, a lawful consideration was conclusively presumed to exist, and could not be denied; but in an action, whether in debt or in assumpsit, upon a simple contract, express or implied, the consideration was open to inquiry. A foreign judgment was not considered, like a judgment of a domestic court of record, as a record or specialty. The form of action, therefore, upon a foreign judgment was not in debt, grounded upon a record or a specialty; but was either in debt, as for a definite sum of money due by simple contract, or in assumpsit upon such a contract. A foreign judgment, being a security of no higher nature than the original cause of action, did not merge that cause of action. The plaintiff might sue, either on the judgment, or on the original cause of action; and in either form of suit the foreign judgment was only evidence of a liability equivalent to a simple contract, and was therefore liable to be controlled by such competent evidence as the nature of the case admitted. See cases already cited, especially *Walker* v. *Witter,* 1 Doug. 1; *Phillips* v. *Hunter,* 2 H. Bl. 402, 410; *Bissell* v. *Briggs,* 9 Mass. 463, 464; *Mills* v. *Duryee,* 7 Cranch, 481, 485; *D'Arcy* v. *Ketchum,* 11 How. 165, 176; *Hall* v. *Odber,* 11 East, 118; *Smith* v. *Nicolls,* 7 Scott, 147; *S. C.* 5 Bing. N. C. 208. See also *Grant* v. *Easton,* 13 Q. B. D. 302, 303; *Lyman* v. *Brown,* 2 Curtis, 559.

Mr. Justice Blackburn, indeed, in determining how far a foreign judgment could be impeached, either for error in law, or for want of jurisdiction, expressed the opinion that the effect of such a judgment did not depend upon what he termed "that which is loosely called 'comity,'" but upon the saying of Baron Parke, above quoted; and consequently "that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action." *Godard* v. *Gray,* (1870) L. R. 6 Q. B. 139, 148, 149; *Schibsby* v. *Westonholz,* (1870) L. R. 6 Q. B. 155, 159. And his example has been followed by some other English judges. Fry, J., in *Rousillon* v. *Rousillon,* (1880) 14 Ch. D. 351, 370; North, J., in *Nouvion v. Freeman,* (1887) 35 Ch. D. 704, 714, 715; Cotton and Lindley, L. JJ., in *Nouvion* v. *Freeman,* (1887) 37 Ch. D. 244, 250, 256.

But the theory that a foreign judgment imposes or creates a duty or obligation is a remnant of the ancient fiction, assumed by Blackstone, saying that "upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it." 3 Bl. Com. 160. That fiction, which embraced judgments upon default, or for torts, cannot convert a transaction wanting the assent of parties into one which necessarily implies it. *Louisiana* v. *New Orleans,* 109 U. S. 285, 288. While the theory in question may help to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law, public or private, and of the comity of our own country, and of foreign nations. It might be safer to adopt the maxim, applied to foreign judgments by Chief Justice Weston, speaking for the Supreme Judicial Court of Maine, *judicium redditur in invitum,* or, as given by Lord Coke, *in praesumptione legis judicium redditur in invitum.* *Jordan* v. *Robinson,* (1838) 15 Maine, 167, 168; Co. Lit. 248 *b.*

In *Russel* v. *Smyth,* above cited, Baron Parke took the precaution of adding, "Nor need we say how far the judgment of a court of competent jurisdiction, in the absence of fraud, is conclusive upon the parties." 9 M. & W. 819. He could hardly have contemplated erecting a rule of local procedure into a canon of private international law, and a substitute for "the comity of nations," on which, in an earlier case, he had himself relied as the ground for enforcing in England a right created by a law of a foreign country. *Alivon* v. *Furnival,* 1 Cr., M. & R. 277, 296; *S. C.* 4 Tyrwh. 751, 771.

In *Abouloff* v. *Oppenheimer,* (1882) Lord Coleridge and Lord Justice Brett carefully avoided adopting the theory of a legal obligation to pay a foreign judgment as the test in determining how far such a judgment might be impeached. 10 Q. B. D. 295, 300, 305. In *Hawksford* v. *Giffard,* (1886) in the Privy Council, on appeal from the Royal Court of Jersey, Lord Herschell said: "This action is brought upon an English judgment, which, until a judgment was obtained in Jersey, was in that country no more than evidence of a debt." 12 App. Cas. 122, 126. In *Nouvion* v. *Freeman,* in the House of Lords, (1889) Lord Herschell, while he referred to the reliance placed by counsel on the saying of Baron Parke, did not treat a foreign judgment as creating or imposing a new obligation, but only as declaring and establishing that a debt or obligation existed. His words were: "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists, which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that, giving credit to the courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation." And Lord Bramwell said: "How can it be said that there is a legal obligation on the part of a man to pay a debt, who has a right to say, 'I owe none, and no judgment has established against me that I do?' I cannot see." The foreign judgment in that case was allowed no force, for want of finally establishing the existence of a debt. 15 App. Cas. 1, 9, 10, 14.

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants, that they should be held bound by the judgment.

Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England.

In *General Steam Navigation Co.* v. *Guillou,* (1843) in an action at law to recover damages to the plaintiff's ship by a collision with the defendant's ship through the negligence of the master and crew of the latter, the defendant pleaded a judgment by which a French court, in a suit brought by him, and after the plaintiffs had been cited, had appeared, and had asserted fault on this defendant's part, had adjudged that it was the ship of these plaintiffs, and not that of this defendant, which was in fault. It was not shown or suggested that the ship of these plaintiffs was in the custody or possession of the French court. Yet Baron Parke, delivering a considered judgment of the Court of Exchequer, (Lord Abinger and Barons Alderson and Rolfe concurring,) expressed a decided opinion that the pleas were bad in substance, for these reasons: "They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance, or domicil, or temporary presence, by a decision of a French court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey." 11 M. & W. 877, 894; *S. C.* 13 Law Journal (N. S.) Exch. 168, 176.

But it is now settled in England that, while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. *De Cosse Brissac* v. *Rathbone,* (1860) 6 H. & N. 301; *S. C.* 20 Law Journal (N. S.) Exch. 238; *Schibsby* v. *Westenholz,* (1870) L. R. 6 Q. B. 155, 162; *Voinet* v. *Barrett,* (1885) 1 Cab. & El. 554; *S. C.* 54 Law Journal (N. S.) Q. B. 521, and 55 Law Journal (N. S.) Q. B. 39.

The present case is not one of a person traveling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the State of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants.

It is next objected that in those courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party, and that the defendants were, therefore, deprived of safeguards which are by our law considered essential to secure honesty and to detect fraud in a witness; and also that documents and papers were admitted in evidence, with which the defendants had no connection, and which would not be admissible under our own system of jurisprudence. But it having been shown by the plaintiffs, and hardly denied by the defendants, that the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.

It is also contended that a part of the plaintiffs' claim is affected by one of the contracts between the parties having been made in violation of the revenue laws of the United States, requiring goods to be invoiced at their actual market value. Rev. Stat. § 2854. It may be assumed that, as the courts of a country will not enforce contracts made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract. *Armstrong* v. *Toler,* 11 Wheat. 258; *De Brimont* v. *Penniman,* 10 Blatchford, 436; *Lang* v. *Holbrook,* Crabbe, 179; Story's Conflict of Laws, §§ 244, 246; Wharton's Conflict of Laws, § 656. But as this point does not affect the whole claim in this case, it is sufficient, for present purposes, to say that there does not appear to have been any distinct offer to prove that the invoice value of any of the goods sold by the plaintiffs to the defendants was agreed between them to be, or was, in fact, lower than the actual market value of the goods.

It must, however, always be kept in mind that it is the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party.

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

There is no doubt that both in this country, as appears by the authorities already cited, and in England, a foreign judgment may be impeached for fraud.

Shortly before the Declaration of Independence, the House of Lords, upon the trial of the Duchess of Kingston for bigamy, put to the judges the question whether—assuming a sentence of the ecclesiastical court against a marriage, in a suit for jactitation of marriage, to be conclusive evidence so as to prevent the counsel for the Crown from proving the marriage upon an indictment for polygamy—"the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion." Chief Justice De Grey, delivering the opinion of the judges, which was adopted by the House of Lords, answering this question in the affirmative, said: "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an intrinsic collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal." 20 Howell's State Trials, 537, 543, note; *S. C.* in 2 Smith's Lead. Cas.

All the subsequent English authorities concur in holding that any foreign judgment, whether *in rem* or *in personam*, may be impeached upon the ground that it was fraudulently obtained. *White* v. *Hall*, (1806) 12 Ves. 321, 324; *Bowles* v. *Orr*, (1835) 1 Yo. & Col. Exch. 464, 473; *Price* v. *Dewhurst*, (1837) 8 Sim. 279, 302-305; *Don* v. *Lippmann*, (1837) 5 Cl. & Fin. 1, 20; *Bank of Australasia* v. *Nias*, (1851) 16 Q. B. 717, 735; *Reimers* v. *Druce*, (1856) 23 Beavan, 145, 150; *Castrique* v. *Imrie*, (1870) L. R. 4 H. L. 414, 445, 446; *Godard* v. *Gray*, (1870) L. R. 6 Q. B. 139, 149; *Messina* v. *Petrococchino*, (1872) L. R. 4 P. C. 144, 157; *Ochsenbein* v. *Papelier*, (1873) L. R. 8 Ch. 695.

Under what circumstances this may be done does not appear to have ever been the subject of judicial investigation in this country.

It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it. *United States* v. *Throckmorton*, 98 U. S. 61, 65, 66; *Vance* v. *Burbank*, 101 U. S. 514, 519; *Steel* v. *Smelting Co.*, 106 U. S. 447, 453; *Moffat* v. *United States*, 112 U. S. 24, 32; *United States* v. *Minor*, 114 U. S. 233, 242. And in one English case, where a ship had been sold under a foreign judgment, the like restriction upon impeaching that judgment for fraud was suggested; but the decision was finally put upon the ground that the judicial sale passed the title to the ship. *Cammell* v. *Sewell*, (1858-60) 3 H. & N. 617, 646; 5 H. & N. 728, 729, 742.

But it is now established in England, by well considered and strongly reasoned decisions of the Court of Appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.

In *Abouloff* v. *Oppenheimer,* (1882) the plaintiff had recovered a judgment at Tiflis in Russia, ordering the defendants to return certain goods or to pay their value. The defendants appealed to a higher Russian court, which confirmed the judgment, and ordered the defendants to pay, besides the sum awarded below, an additional sum for costs and expenses. In an action in the English High Court of Justice upon those judgments, the defendants pleaded that they were obtained by the gross fraud of the plaintiff, in fraudulently representing to the Russian courts that the goods in question were not in her possession when the suit was commenced, and when the judgment was given, and during the whole time the suit was pending; and by fraudulently concealing from those courts the fact that those goods, as the fact was, and as she well knew, were in her actual possession. A demurrer to this plea was overruled, and judgment entered for the defendants. And that judgment was affirmed in the Court of Appeal by Lord Chief Justice Coleridge, Lord Justice Baggallay and Lord Justice Brett, all of whom delivered concurring opinions, the grounds of which sufficiently appear in the opinion delivered by Lord Justice Brett (since Lord Esher, Master of the Rolls), who said: "With regard to an action brought upon a foreign judgment, the whole doctrine as to fraud is English, and is to be applied in an action purely English. I am prepared to hold, according to the judgment of the House of Lords adopting the proposition laid down by De Grey, C. J., that if the judgment upon which the action is brought was procured from the foreign court by the successful fraud of the party who is seeking to enforce it, the action in the English court will not lie. This proposition is absolute and without any limitation, and, as the Lord Chief Justice has pointed out, is founded on the doctrine that no party in an English court shall be able to take advantage of his own wrongful act, or, as it may be stated in other language, that no obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation." "I will assume that in the suit in the Russian courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action. It has been contended that the same issue ought not to be tried in an English court which was tried in the Russian courts; but I agree that the question whether the Russian courts were deceived never could be an issue in the action tried before them." "In the present case, we have had to consider the question fully; and, according to the best opinion which I can form, fraud committed by a party to a suit, for the purpose of deceiving a foreign court, is a defense to an action in this country, founded upon the judgment of that foreign court. It seems to me that if we were to accede to the argument for the plaintiff, the result would be that a plausible deceiver would succeed, whereas a deceiver who is not plausible would fail. I cannot think that plausible fraud ought to be upheld in any court of justice in England. I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the courts of this country; and further, that nothing ought to persuade an English court to enforce a judgment against one party, which has been obtained by the fraud of the other party to the suit in the foreign court." 10 Q. B. 295, 305-308.

The same view was affirmed and acted on in the same court by Lords Justices Lindley and Bowen in *Vadala* v. *Lawes,* (1890) 25 Q. B. D. 310, 317-320, and by Lord Esher and Lord Justice Lopes in *Crozat* v. *Brogden,* (1894) 2 Q. B. 30, 34, 35.

In the case at bar, the defendants offered to prove, in much detail, that the plaintiffs presented to the French court of first instance and to the arbitrator appointed by that court, and upon whose report its judgment was largely based, false and fraudulent statements and accounts against the defendants, by which the arbitrator and the French courts were deceived and misled, and their judgments were based upon such false and fraudulent statements and accounts. This offer, if satisfactorily proved, would, according to the decisions of the English Court of Appeal in *Abouloff* v. *Oppenheimer, Vadala* v. *Lawes,* and *Crozat* v. *Brogden,* above cited, be a sufficient ground for impeaching the foreign judgment, and examining into the merits of the original claim.

But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

In France, the Royal Ordinance of June 15, 1629, art. 121, provided as follows: "Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall have no lien or execution in our kingdom. Thus the contracts shall stand for simple promises; and, notwithstanding the judgments, our subjects against whom they have been rendered may contest their rights anew before our judges." Touillier, Droit Civil, lib. 3, tit. 3, c. 6, sect. 3, no. 77.

By the French Code of Civil Procedure, art. 546, "Judgments rendered by foreign tribunals, and acts acknowledged before foreign officers, shall not be capable of execution in France, except in the manner and in the cases provided by articles 2123 and 2128 of the Civil Code," which are as follows: By article 2123, "A lien cannot arise from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal; without prejudice to provisions to the contrary which may exist in public laws and treaties." By article 2128, "Contracts entered into in a foreign country cannot give a lien upon property in France, if there are no provisions contrary to this principle in public laws or in treaties." Touillier, *ub. sup.* no. 84.

The defendants, in their answer, cited the above provisions of the statutes of France, and alleged, and at the trial offered to prove, that, by the construction given to these statutes by the judicial tribunals of France, when the judgments of tribunals of foreign countries against the citizens of France are sued upon in the courts of France, the merits of the controversies upon which those judgments are based are examined anew, unless a treaty to the contrary effect exists between the Republic of France and the country in which such judgment is obtained, (which is not the case between the Republic of France and the United States,) and that the tribunals of the Republic of France give no force and effect, within the jurisdiction of that country, to the judgments duly rendered by courts of competent jurisdiction of the United States against citizens of France after proper personal service of the process of those courts has been made thereon in this country. We are of opinion that this evidence should have been admitted.

In *Odwin v. Forbes,* (1817) President Henry, in the Court of Demerara, which was governed by the Dutch law, and was, as he remarked, "a tribunal foreign to and independent of that of England," sustained a plea of an English certificate in bankruptcy, upon these grounds: "It is a principle of their law, and laid down particularly in the ordinances of Amsterdam," "that the same law shall be exercised towards foreigners in Amsterdam as is exercised with respect to citizens of that State in other countries; and upon this principle of reciprocity, which is not confined to the city of Amsterdam, but pervades the Dutch laws, they have always given effect to the laws of that country which has exercised the same comity and indulgence in admitting theirs." "That the Dutch bankrupt laws proceed on the same principles as those of the English; that the English tribunals give effect to the Dutch bankrupt laws; and that, on the principle of reciprocity and mutual comity, the Dutch tribunals, according to their own ordinances, are bound to give effect to the English bankrupt laws when duly proved, unless there is any express law or ordinance prohibiting their admission." And his judgment was affirmed in the Privy Council on Appeal. Case of *Odwin* v. *Forbes,* pp. 89, 159-161, 173-176; *S. C.* (1818) Buck Bankr. Cas. 57, 64.

President Henry, at page 76 of his Treatise on Foreign Law, published as a preface to his report of that case, said: "This comity, in giving effect to the judgments of other tribunals, is generally exercised by States under the same sovereign, on the ground that he is the fountain of justice in each though of independent jurisdiction; and it has also been exercised in different States of Europe with respect to foreign judgments, particularly in the Dutch States, who are accustomed by the principle of reciprocity to give effect in their territories to the judgments of foreign States, which show the same comity to theirs; but the tribunals of France and England have never exercised this comity to the degree that those of Holland have, but always required a fresh action to be brought, in which the foreign judgment may be given in evidence. As this is a matter of positive law and internal policy in each State, no opinion need be given; besides, it is a mere question of comity, and perhaps it might be neither politic nor prudent, in two such great States, to give indiscriminate effect to the judgment of each other's tribunals, however the practice might be proper or convenient in federal States, or those under the same sovereign."

It was that statement, which appears to have called forth the observations of Mr. Justice Story, already cited: "Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." Story's Conflict of Laws, § 618.

This rule, though never either affirmed or denied by express adjudication in England or America, has been indicated, more or less distinctly, in several of the authorities already cited.

Lord Hardwicke threw out a suggestion that the credit to be given by one court to the judgment of a foreign court might well be affected by "their proceeding both by the same rules of law." *Otway* v. *Ramsay*, 4 B. & C. 414-416, note.

Lord Eldon, after saying that "natural law" (evidently intending the law of nations) "requires the courts of this country to give credit to those of another for the inclination and power to do justice," added that "if it appears in evidence, that persons suing under similar circumstances neither had met, nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption." *Wright* v. *Simpson*, 6 Ves. 714, 730.

Lord Brougham, presiding as Lord Chancellor in the House of Lords, said: "The law in the course of procedure abroad sometimes differs so mainly from ours in the principles upon which it is bottomed, that it would seem a strong thing to hold that our courts were bound conclusively to give execution to the sentence of foreign courts, when, for aught we know, there is not any one of those things which are reckoned the elements or the corner stones of the due administration of justice, present to the procedure in these foreign courts." *Houlditch* v. *Donegal*, 8 Bligh, N. R. 301, 338.

Chief Justice Smith, of New Hampshire, in giving reasons why foreign judgments or decrees, founded on the municipal laws of the State in which they are pronounced, are not conclusive evidence of debt, but *prima facie* evidence only, said: "These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself." *Bryant* v. *Ela*, Smith (N. H.) 396, 404.

Mr. Justice Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice." *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumner, 600, 608.

Mr. Justice Woodbury said that judgments *in personam*, rendered under a foreign government, "are, *ex comitate*, treated with respect, according to the nature of the judgment, and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments;" and added, "Nor can much comity be asked for the judgments of another nation, which, like France, pays no respect to those of other countries." *Burnham* v. *Webster*, 1 Woodb. & Min. 172, 175, 179.

Mr. Justice Cooley said, "True comity is equality; we should demand nothing more, and concede nothing less." *McEwan* v. *Zimmer*, 38 Michigan, 765, 769.

Mr. Wheaton said: "There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of States—*ex comitate, ob reciprocam utilitatem*." "The general comity, utility and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution." Wheaton's International Law, (8th ed.) §§ 79, 147.

Since Story, Kent and Wheaton wrote their commentaries, many books and essays have been published upon the subject of the effect to be allowed by the courts of one country to the judgments of another, with references to the statutes and decisions in various countries. Among the principal ones are Foelix, Droit International Prive, (4th ed.) by Demangeat, 1866) lib. 2, tits. 7, 8; Moreau, Effets Internationaux des Jugements (1884); Piggott, on Foreign Judgments (2d ed. 1884); Constant, de l'Execution des Jugements Etrangers (2d ed. 1890), giving the text of the articles of most of the modern codes upon the subject, and of French treaties with Italian, German and Swiss States; and numerous papers in Clunet's Journal de Droit International Prive, established in 1874, and continued to the present time. For the reasons stated at the outset of this opinion, we have not thought it important to state the conflicting theories of continental commentators and essayists as to what each may think the law ought to be; but have referred to their works only for evidence of authoritative declarations, legislative or judicial, of what the law is.

By the law of France, settled by a series of uniform decisions of the Court of Cassation, the highest judicial tribunal, for more than half a century, no foreign judgment can be rendered executory in France without a review of the judgment *au fond*—to the bottom, including the whole merits of the cause of action on which the judgment rests. Pardessus, Droit Commercial, § 1488; Bard, Precis de Droit International, (1883) nos. 234-239; Story's Conflict of Laws, §§ 615-617; Piggott, 452; Westlake on Private International Law, (3d ed. 1890) 350.

A leading case was decided by the Court of Cassation on April 19, 1819, and was as follows: A contract of partnership was made between Holker, a French merchant, and Parker, a citizen of the United States. Afterwards, and before the partnership accounts were settled; Parker came to France, and Holker sued him in the Tribunal of Commerce of Paris. Parker excepted, on the ground that he was a foreigner, not domiciled in France; and obtained a judgment, affirmed on appeal, remitting the matter to the American courts—*obtint son renvoi devant les tribunaux Americains.* Holker then sued Parker in the Circuit Court of the United States for the District of Massachusetts, and in 1814 obtained a judgment there, ordering Parker to pay him $529,949. (One branch of the controversy had been brought before this court in 1813. *Holker* v. *Parker*, 7 Cranch, 436.) Holker, not being able to obtain execution of that judgment in America, because Parker had no property there and continued to reside in Paris, obtained from a French judge an order declaring the judgment executory. Upon Parker's application to nullify the proceeding, the Royal Court of Paris, reversing the judgment of a lower court, set aside that order, assigning these reasons: "Considering that judgments rendered by foreign courts have neither effect nor authority in France; that this rule is doubtless more particularly applicable in favor of Frenchmen, to whom the King and his officers owe a special protection; but that the principle is absolute, and may be invoked by all persons without distinction, being founded on the independence of States; that the Ordinance of 1629, in the beginning of its article 121, lays down the principle in its generality, when it says that judgments rendered in foreign kingdoms and sovereignties, for any cause whatever, shall have no execution in the kingdom of France; and that the Civil Code, art. 2123, gives to this principle the same latitude, when it declares that a lien cannot result from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal —which is not a matter of mere form, like the granting in past times of a *pareatis* from one department to another for judgments rendered within the kingdom; but which assumes, on the part of the French tribunals, a cognizance of the cause, and a full examination of the justice of the judgment presented for execution, as reason demands, and this has always been practised in France, according to the testimony of our ancient authorities; that there may result from this an inconvenience, where the debtor, as is asserted to have happened in the present case, removes his property and his person to France, while keeping his domicil in his native country; that it is for the creditor to be watchful, but that no consideration can impair a principle on which rests the sovereignty of governments, and which, whatever be the case, must preserve its whole force." The court therefore adjudged that, before the tribunal of first instance, Holker should state the grounds of his action, to be contested by Parker, and to be determined by the court upon cognizance of the whole cause. That judgment was confirmed, upon deliberate consideration, by the Court of Cassation, for the reasons that the Ordinance of 1629 enacted, in absolute terms and without exception, that foreign judgments should not have execution in France; that it was only by the Civil Code and the Code of Civil Procedure that the French tribunals had been authorized to declare them executory; that therefore the Ordinance of 1629 had no application; that the articles of the Codes, referred to, did not authorize the courts to declare judgments, rendered in a foreign country, executory in France without examination; that such an authorization would be as contrary to the institution of the courts, as would be the award or the refusal of execution arbitrarily and at will; would impeach the right of sovereignty of the French government, and was not in the intention of the legislature; and that the Codes made no distinction between different judgments rendered in a foreign country, and permitted the judges to declare them all executory; and therefore those judgments, whether against a Frenchman or against a foreigner, were subject to examination on the merits. *Holker* v. *Parker,* Merlin, Questions de Droit, Jugement, § 14, no. 2.

The Court of Cassation has ever since constantly affirmed the same view. Moreau, no. 106, note, citing many decisions; Clunet, 1882, p. 166. In Clunet, 1894, p. 913, note, it is said to be "settled by judicial decisions—*il est de jurisprudence*—that the French courts are bound, in the absence of special diplomatic treaties, to proceed to the revision on the whole merits—*au fond*—of foreign judgments, execution of which is demanded of them," citing, among other cases, a decision of the Court of Cassation on February 2, 1892, by which it was expressly held to result from the articles of the Codes, above cited, "that judgments rendered, in favor of a foreigner against a Frenchman, by a foreign court, are subject, when execution of them is demanded in France, to the revision of the French tribunals, which have the right and the duty to examine them, both as to the form, and as to the merits." Sirey, 1892, 1, 201.

In Belgium, the Code of Civil Procedure of 1876 provides that if a treaty on the basis of reciprocity be in existence between Belgium and the country in which the foreign judgment has been given, the examination of the judgment in the Belgian courts shall bear only upon the questions whether it "contains nothing contrary to public order, to the principles of the Belgian public order;" whether, by the law of the country in which it was rendered, it has the force of *res judicata;* whether the copy is duly authenticated; whether the defendant's rights have been duly respected; and whether the foreign court is not the only competent court, by reason of the nationality of the plaintiff. Where, as is the case between Belgium and France, there is no such treaty, the Belgian Court of Cassation holds that the foreign judgment may be re-examined upon the merits. Constant, 111, 116; Moreau, no. 189; Clunet, 1887, p. 217; 1888, p. 837; Piggott, 439. And in a very recent case, the Civil Tribunal of Brussels held that, "considering that the right of revision is an emanation of the right of sovereignty; that it proceeds from the *imperium,* and that, as such, it is within the domain of public law; that from that principle it manifestly follows that, if the legislature does not recognize executory force in foreign judgments where there exists no treaty upon the basis of reciprocity, it cannot belong to the parties to substitute their will for that of the legislature, by arrogating to themselves the power of delegating to the foreign judge a portion of sovereignty." Clunet, 1894, pp. 164, 165.

In Holland, the effect given to foreign judgments has always depended upon reciprocity, but whether by reason of Dutch ordinances only, or of general principles of jurisprudence, does not clearly appear. *Odwin* v. *Forbes,* and Henry on Foreign Law, above cited; Story's Conflict of Laws, § 618; Foelix, no. 397, note; Clunet, 1879, p. 369; 1 Ferguson's International Law, 85; Constant, 171; Moreau, no. 213.

In Denmark, the courts appear to require reciprocity to be shown before they will execute a foreign judgment. Foelix, nos. 328, 345; Clunet, 1891, p. 987; Westlake, *ub. sup.* In Norway, the courts re-examine the merits of all foreign judgments, even of those of Sweden. Foelix, no. 401; Piggott, 504, 505; Clunet, 1892, p. 296. In Sweden, the principle of reciprocity has prevailed from very ancient times; the courts give no effect to foreign judgments, unless upon that principle; and it is doubtful whether they will even then, unless reciprocity is secured by treaty with the country in which the judgment was rendered. Foelix, no. 400; Olivecrona, in Clunet, 1880, p. 83; Constant, 191; Moreau, no. 222; Piggott, 503; Westlake, *ub. sup.*

In the Empire of Germany, as formerly in the States which now form part of that Empire, the judgments of those States are mutually executed; and the principle of reciprocity prevails as to the judgments of other countries. Foelix, nos. 328, 331, 333-341; Moreau, nos. 178, 179; Vierhaus, in Piggott, 460-474; Westlake, *ub sup.* By the German Code of 1877, "compulsory execution of the judgment of a foreign court cannot take place, unless its admissibility has been declared by a judgment of exequatur;" "the judgment of exequatur is to be rendered without examining whether the decision is conformable to law;" but it is not to be granted "if reciprocity is not guaranteed." Constant, 79-81; Piggott, 466. The Reichsgericht, or Imperial Court, in a case reported in full in Piggott, has held that an English judgment cannot be executed in Germany, because, the court said, the German courts, by the Code, when they execute foreign judgments at all, are "bound to the unqualified recognition of the legal validity of the judgments of foreign courts," and "it is, therefore, an essential requirement of reciprocity, that the law of the foreign State should recognize in an equal degree the legal validity of the judgments of German courts, which are to be enforced by its courts; and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of their execution, by the court *ex officio,* nor be allowed by the admission of pleas which might lead to it." Piggott, 470, 471. See also Clunet, 1882, p. 35; 1883, p. 246; 1884, p. 600.

In Switzerland, by the Federal Constitution, civil judgments in one canton are executory throughout the Republic. As to foreign judgments, there is no federal law, each canton having its own law upon the subject. But in the German cantons, and in some of the other cantons, foreign judgments are executed according to the rule of reciprocity only. Constant, 193-204; Piggott, 505-516; Clunet, 1887, p. 762; Westlake, *ub sup.* The law upon this subject has been clearly stated by Brocher, President of the Court of Cassation of Geneva, and professor of law in the university there. In his Nouveau Traite de Droit International Prive, (1876) § 174, treating of the question whether "it might not be convenient that States should execute, without reviewing their merits, judgments rendered on the territory of each of them respectively," he says: "It would, certainly, be advantageous for the parties interested to avoid the delays, the conflicts, the differences of opinion, and the expenses resulting from the necessity of obtaining a new judgment in each locality where they should seek execution. There might thence arise, for each sovereignty, a juridical or moral obligation to lend a strong hand to foreign judgments. But would not such an advantage be counterbalanced, and often surpassed, by the dangers that might arise from that mode of proceeding? There is here, we believe, a question of reciprocal appreciation and confidence. One must, at the outset, inquire whether the administration of the foreign judiciary, whose judgments it is sought to execute without verifying their merits, presents sufficient guaranties. If the propriety of such an execution be admitted, there is ground for making it the object of diplomatic treaties. That form alone can guarantee the realization of a proper reciprocity; it furnishes, moreover, to each State the means of acting upon the judicial organization and procedure of other States." In an article in the Journal, after a review of the Swiss decisions, he recognizes and asserts that "it comes within the competency of each canton to do what seems to it proper in such matters." Clunet, 1879, pp. 88. 94. And in a later treatise, he says: "We cannot admit that the recognition of a State as sovereign ought necessarily to have as a consequence the obligation of respecting and executing the judicial decisions rendered by its tribunals; in strict right, the authority of such acts does not extend beyond the frontier. Each sovereignty possesses in particular, and more or less in private, the territory subject to its power. No other can exercise there an act of its authority. This territorial independence finds itself, in principle, directly included in the very act by which one nation recognizes a foreign State as sovereign; but there cannot result therefrom a promise to adopt, and to cause to be executed upon the national territory, judgments rendered by the officials of the foreign State, whoever they may be. That would be an abdication of its own sovereignty; and would bind it in such sort as to make it an accomplice in acts often injurious, and in some cases even criminal. Such obligations suppose a reciprocal confidence; they are not undertaken, moreover, except upon certain conditions, and by means of a system of regulations intended to prevent or to lessen the dangers which might result from them." 3 Cours de Droit International Prive, (1885) 126, 127.

In Russia, by the Code of 1864, "the judgments of foreign tribunals shall be rendered executory according to the rules established by reciprocal treaties and conventions," and, where no rules have been established by such treaties, are to be "put in execution in the Empire, only after authorization granted by the courts of the Empire;" and, "in deciding upon demands of this kind, the courts do not examine into the foundation of the dispute adjudged by the foreign tribunals, but decide only whether the judgment does not contain dispositions which are contrary to the public order, or which are not permitted by the laws of the Empire." Constant, 183-185. Yet a Chamber of the Senate of St. Petersburg, sitting as a Court of Cassation, and the highest judicial tribunal of the Empire in civil matters, has declined to execute a French judgment, upon the grounds that, by the settled law of Russia, "it is a principle in the Russian Empire that only the decisions of the authorities to whom jurisdiction has been delegated by the sovereign power have legal value by themselves and of full right:" and that "in all questions of international law, reciprocity must be observed and maintained as a fundamental principle." *Adam* v. *Schipoff,* Clunet, 1884, pp. 45, 46, 134. And Professor Englemann, of the Russian University of Dorpat, in an able essay, explaining that and other Russian decisions, takes the following view of them: "The execution of a treaty is not the only proof of reciprocity." "It is necessary to commit the ascertainment of the existence of reciprocity to the judicial tribunals, for the same reasons for which there is conferred upon them the right to settle all questions incident to the cause to be adjudged. The existence of reciprocity between two States ought to be proved in the same manner as all the positive facts of the case." "It is true that the principle of reciprocity is a principle, not of right, but of policy; yet the basis of the principle of all regular and real policy is also the fundamental principle of right and the point of departure of all legal order—the *suum cuique.* This last principle comprehends right, reciprocity, utility; and reciprocity is the application of right to policy." "Let this principle be applied wherever there is the least guaranty, or even a probability of reciprocity, and the cognizance of this question be committed to the judicial tribunals, and one will arrive at important results, which, on their side, will touch the desired end, international accord. But, for this, it is indispensable that the application of this principle should be entrusted to judicial tribunals, accustomed to decide affairs according to right, and not to administrative authorities, which look above all to utility, and are accustomed to be moved by political reasons, intentions, and even passions." Clunet, 1884, pp. 120-122. But it would seem that no foreign judgment will be executed in Russia, unless reciprocity is secured by treaty. Clunet, 1884, pp. 46, 113, 139, 140, 602.

In Poland, the provisions of the Russian Code are in force; and the Court of Appeal of Warsaw has decided that, where there is no treaty, the judgments of a foreign country cannot be executed, because, "in admitting a contrary conclusion, there would be impugned one of the cardinal principles of international relations, namely, the principle of reciprocity, according to which each State recognizes juridical rights and relations, originating or established in another country, only in the measure in which the latter, in its turn, does not disregard the rights and relations existing in the former." Clunet, 1884, pp. 494, 495.

In Roumania, it is provided by code that "judicial decisions rendered in foreign countries cannot be executed in Roumania, except in the same manner in which Roumanian judgments are executed in the country in question, and provided they are declared executory by competent Roumanian judges;" and this article seems to be held to require legislative reciprocity. Moreau, no. 219; Clunet, 1879, p. 351; 1885, p. 537; 1891, p. 452; Piggott, 495.

In Bulgaria, by a resolution of the Supreme Court, in 1881, "the Bulgarian judges should, as a general rule, abstain from entering upon the merits of the foreign judgment; they ought only to inquire whether the judgment submitted to them does not contain dispositions contrary to the public order, and to the Bulgarian laws." Constant, 129, 130; Clunet, 1886, p. 570. This resolution closely follows the terms of the Russian Code, which, as has been seen, has not precluded applying the principle of reciprocity.

In Austria, the rule of reciprocity does not rest upon any treaty or legislative enactment, but has been long established, by imperial decrees and judicial decisions, upon general principles of jurisprudence. Foelix, no. 331; Constant, 100-108; Moreau, no. 185; Weiss, Traite de Droit International, (1886) 980; Clunet, 1891, p. 1003; 1894, p. 908; Piggott, 434. In Hungary, the same principles were always followed as in Austria; and reciprocity has been made a condition by a law of 1880. Constant, 109; Moreau, no. 186 & note; Piggott, 436; Weiss, *ub sup.*

In Italy before it was united into one kingdom, each State had its own rules. In Tuscany, and in Modena, in the absence of treaty, the whole merits were reviewed. In Parma, as by the French Ordinance of 1629, the foreign judgment was subject to fundamental revision, if against a subject of Parma. In Naples, the code and the decisions followed those of France. In Sardinia, the written laws required above all the condition of reciprocity, and, if that condition was not fulfilled, the foreign judgment was re-examinable in all respects. Fiore, Effetti Internazionali delle Sentenze, (1875) 40-44; Moreau, no. 204. In the Papal States, by a decree of the Pope in 1820, "the exequatur shall not be granted, except so far as the judgments rendered in the States of his Holiness shall enjoy the same favor in the foreign countries; this reciprocity is presumed, if there is no particular reason to doubt it." Touillier, Droit Civil, lib. 3, tit. 3, c. 6, sec. 3, no. 93. And see Foelix, no. 343; Westlake, *ub. sup.* In the Kingdom of Italy, by the Code of Procedure of 1865, "executory force is given to the judgments of foreign judicial authorities by the court of appeal in whose jurisdiction they are to be executed, by obtaining a judgment on an exequatur in which the court examines (*a*) if the judgment has been pronounced by a competent judicial authority; (*b*) if it has been pronounced, the parties being regularly cited; (*c*) if the parties have been legally represented or legally defaulted; (*d*) if the judgment contains dispositions contrary to public order or to the internal public law of the realm." Constant, 157. In 1874, the Court of Cassation of Turin, "considering that in international relations is admitted the principle of reciprocity, as that which has its foundation in the natural reason of equality of treatment, and, in default thereof, opens the way to the exercise of the right of retaliation;" and that the French courts examine the merits of Italian judgments, before allowing their execution in France; decided that the Italian courts of appeal, when asked to execute a French judgment, ought not only to inquire into the competency of the foreign court, but also to review the merits and the justice of the controversy. *Levi* v. *Pitre,* in Rossi, Esecuzione delle Sentenze Straniere, (1st ed. 1875) 70, 284; and in Clunet, 1879, p. 295. Some commentators, however, while admitting that decision to be most authoritative, have insisted that it is unsound, and opposed to other Italian decisions, to which we have not access. Rossi, *ub. sup.* (2d ed. 1890) 92; Fiore, 142, 143; Clunet, 1878, p. 237; Clunet, 1879, pp. 296, 305; Piggott, 483; Constant, 161.

In the principality of Monaco, foreign judgments are not executory, except by virtue of a special ordinance of the Prince, upon a report of the Advocate General. Constant, 169; Piggott, 488.

In Spain, formerly, foreign judgments do not appear to have been executed at all. Foelix, no. 398; Moreau, no. 197; Silvela, in Clunet, 1881, p. 20. But by the Code of 1855, revised in 1881 without change in this respect, "judgments pronounced in foreign countries shall have in Spain the force that the respective treaties give them; if there are no special treaties with the nation in which they have been rendered, they shall have the same force that is given by the laws of that nation to Spanish executory judgments; if the judgment to be executed proceeds from a nation by whose jurisprudence effect is not given to the judgments pronounced by Spanish tribunals, it shall have no force in Spain;" and "application for the execution of judgments pronounced in foreign countries shall be made to the Supreme Tribunal of Justice; which, after examining an authorized translation of the foreign judgment, and after hearing the party against whom it is directed and the public minister, shall decide whether it ought or ought not to be executed." Constant, 141, 142; Piggott, 499, 500. A case in which the Supreme Court of Spain in 1880 ordered execution of a French judgment, after reviewing its merits, is reported in Clunet, 1881, p. 365. In another case, in 1888, the same court, after hearing the parties and the public minister, ordered execution of a Mexican judgment. The public minister, in his demand for its execution, said: "Our law of civil procedure, inspired, to a certain point, by the modern theories of international law, which, recognizing among civilized nations a true community of right, and considering mankind as a whole in which nations occupy a position identical with that of individuals towards society, gives authority, in Spain, to executory judgments rendered by foreign tribunals, even in the absence of special treaty, provided that those countries do not proscribe the execution there of our judgments, and under certain conditions which, if they limit the principle, are inspired by the wish of protecting our sovereignty and by the supreme exigencies of justice. When nothing appears, either for or against, as to the authority of the judgments of our courts in the foreign country, one should not put an obstacle to the fulfilment, in our country, of judgments emanating from other nations, especially when the question is of a country which, by its historic origin, its language, its literature, and by almost the identity of its customs, its usages, and its social institutions, has so great a connection with our own—which obliges us to maintain with it the most intimate relations of friendship and courtesy." And he pointed out that Mexico, bv its code, had adopted reciprocity as a fundamental principle. Among the reasons assigned by the court for ordering the Mexican judgment to be executed was that "there exists in Mexico no precedent of jurisprudence which refuses execution to judgments rendered by the Spanish tribunals." Clunet, 1891, pp. 288-292.

In Portugal, foreign judgments, whether against a Portuguese or against a foreigner, are held to be reviewable upon the merits before granting execution thereof. Foelix, no. 399; Clunet, 1875, pp. 54, 448; Moreau, no. 217; Constant, 176-180; Westlake, *ub. sup.*

In Greece, by the provisions of the Code of 1834, foreign judgments, both parties to which are foreigners, are enforced without examination of their merits; but if one of the parties is a Greek, they are not enforced if found contradictory to the facts proved, or if they are contrary to the prohibitive laws of Greece. Foelix, no. 396; Constant, 151, 152; Moreau, no. 202; Saripolos, in Clunet, 1880, p. 173; Piggott, 475.

In Egypt, under the influence of European jurisprudence, the code of civil procedure has made reciprocity a condition upon which foreign judgments are executed. Constant, 136; Clunet, 1887, pp. 98, 228; 1889, p. 322.

In Cuba and in Porto Rico, the codes of civil procedure are based upon the Spanish code of 1855. Piggott, 435, 503. In Hayti, the code re-enacts the provisions of the French code. Constant, 153; Moreau, no. 203; Piggott, 460.

In Mexico, the system of reciprocity has been adopted, by the Code of 1884, as the governing principle. Constant, 168; Clunet, 1891, p. 290.

The rule of reciprocity likewise appears to have generally prevailed in South America. In Peru, foreign judgments do not appear to be executed without examining the merits, unless when reciprocity is secured by treaty. Clunet, 1879, pp. 266, 267; Piggott, 548. In Chili, there appears to have been no legislation upon the subject; but, according to a decision of the Supreme Court of Santiago in 1886, "the Chilian tribunals should not award an exequatur, except upon decisions in correct form, and also reserving the general principle of reciprocity." Clunet, 1889, p. 135; Constant, 131, 132. In Brazil, foreign judgments are not executed, unless because of the country in which they were rendered admitting the principle of reciprocity, or because of a *placet* of the government of Brazil, which may be awarded according to the circumstances of the case. Constant, 124 & note; Moreau, no. 192; Piggott, 543-546; Westlake, *ub. sup.* In the Argentine Republic, the principle of reciprocity was maintained by the courts, and was affirmed by the Code of 1878, as a condition *sine qua non* of the execution of foreign judgments, but has perhaps been modified by later legislation. Moreau, no. 218; Palomeque, in Clunet, 1887, pp. 539-558.

It appears, therefore, that there is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States—Norway, Portugal, Greece, Monaco, and Hayti—the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe—in Belgium, Holland, Denmark, Sweden, Germany, in many cantons in Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary, (perhaps in Italy,) and in Spain—as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in § 618 of his Commentaries on the Conflict of Laws, already cited,) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to re-examination, either merely because it was a foreign judgment, or because judgments of that nation would be re-examinable in the courts of France.

For these reasons, in the action at law, the

Judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.

For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and, therefore, the

Decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

CORPORATIONS.

THOMPSON v. WATERS, 25 MICH. 214, (1872).

Error to St. Joseph Circuit.

In view of the importance of the question involved, the court of its own motion ordered a re-argument of this cause.

H. H. Riley and *R. Brackenridge,* for plaintiff in error.

Shipman & Loveridge, for defendant in error.

CHRISTIANCY, CH. J.

This was an action of ejectment brought by the plaintiff in error against the defendant in error in the circuit court for the county of St. Joseph, to recover the north half of the south half of section 24, township 7 south, of range 11 west, situated in said county of St. Joseph.

Both parties claimed title through J. Eastman Johnson, who owned the land previous to the deeds stated below.

The plaintiff's claim of title was this: On the 20th of July, 1853, Johnson, by warranty deed, conveyed the land to the Fort Wayne & Chicago Railroad company, a company incorporated under the laws of Indiana. By several acts passed by the legislatures of the states of Pennsylvania, Ohio, Indiana, and Illinois, authorizing the consolidation of railroad companies, and by the articles of consolidation of the 6th May, 1856, consolidating the Ohio & Penn. R. R. company, the Ohio & Indiana railroad company, and this Fort Wayne & Chicago railroad company, under the name of "The Pittsburgh, Fort Wayne & Chicago Railroad Company," all the powers, rights, and franchises of said several companies so consolidated, passed to, and became vested in, the said Pittsburgh, Fort Wayne & Chicago railroad company. This consolidated company, on the first day of December, 1856, executed to Hugh McCullough, as trustee, a mortgage upon this and other lands and property. And the said Pittsburgh, Fort Wayne & Chicago railroad company, and McCullough, the mortgagee, by their several deeds, dated respectively October 17th, and October 24, 1860, conveyed the land in question to the plaintiff. All the foregoing were duly recorded in the office of the register of deeds for St. Joseph county, prior to the execution of the deed from Johnson to Merrick, mentioned below.

The defendant claimed title under the following conveyances:

1st. A quit claim deed from J. Eastman Johnson to Benajah G. Merrick, dated November 29, 1860; and

2d. A quit claim deed from Merrick to defendant, dated November 30, 1866; both of which deeds are duly recorded. The lands lie at least fifty miles from any part of the railroad in question.

The court charged the jury at the request of the defendant, "that the Fort Wayne & Chicago railroad company, at the time of the execution of the conveyance from Johnson to it, had no power to purchase and hold the lands in question in this state," and, "that the jury will find for the defendant."

This raises the only question in the case which needs to be noticed. Was the Fort Wayne & Chicago railroad company, being a corporation created by, and existing under, the laws of the state of Indiana, competent to take the title to this land in this state, under the deed executed to it by Johnson?

This quesion depends, first, upon the laws of Indiana; and, second, upon the laws of this state, and the public policy indicated by its legislation.

1st. As it was an artificial being, created only by the laws of Indiana, and by them alone endowed with whatever powers and capacities it possesses, it could have no capacities nor exercise any powers anywhere, which were not, expressly or by implication, given by those laws; or, in other words, no powers or capacities which would not be recognized and sustained by the courts of that state, had the same question of capacity to take these lands come before them for adjudication.

The Fort Wayne & Chicago railroad company, to whom this land was conveyed, was organized under the general railroad law of that state, entitled, "An act to provide for the incorporation of railroad companies," approved May 11, 1852. Most of the provisions of this act, in reference to the powers of companies to take lands ,confine the power to such as the necessities of the company require, in exercising its franchises of building and maintaining the road.

The second subdivision, however, of the thirteenth section, gives power to "receive, hold, and take such voluntary grants and donations of real estate and personal property as shall be made to it, *to aid in the construction, maintenance, and accommodation of such railroad;* but the real estate thus received, by voluntary grants, shall be held and used for the purpose of such grants only. It might admit of a question whether, under this provision, there was not power to acquire lands to be converted into money for the use of the company; but the question is quite immaterial, since the act of the legislature of the state of Indiana of January 20th, 1852, —which, if it did not take effect at an earlier date, took effect at least with the Revised Statutes of that state, of which it is a part (*Chap. 184*), on the 6th of May, 1853 (*Jones v. Cavins, 4 Ind., 305; Ledley v. The State, id., 580; State v. Kiger, id., 621*),—gives power § 2) to any railroad company which, then or thereafter, might be incorporated, by the consent of the directors of the same, "to receive the subscription for the capital stock of said companies, under such regulations and restrictions as their boards of directors may prescribe, any lands, town lots, real estate, or other description of property, as may be offered for that purpose: *Provided however,* That the same shall be sold, except so much as may be necessary for the use of said road, or for the purposes aforesaid" [referring to certain provisions in the first section, in reference to lands taken on subscription of stock, or purchase for depots, turnouts, workshops, warehouses, etc.], "within a reasonable time, and the proceeds applied for the construction of said roads, or their appurtenances." That under this act the courts of Indiana would hold that these lands, though out of the state, might have been received for stock of the company, is sufficiently apparent from the decision in *Cincinnati, Union & Fort Wayne R. R. Co. v. Pearce, 28 Ind., 502,* in which it was held that lands situated in the state of Ohio, conveyed to an Indiana corporation, under authority of this act, constituted a valid consideration for a contract on the part of the company to issue stock for the amount.

And I see no reason to doubt that the courts of that state would recognize the right of the company to take lands in another state, in payment of a debt due the company, accruing in the legitimate prosecution of its business, and which would, therefore, be represented by the stock of the company. Indeed, independent of this act of January 20th, 1852, I see no reason why the courts of that state should not recognize the right of the company to take such lands in payment of a debt so accruing, though they might not allow them to take the funds of the company to invest in another state. The main objection to allowing corporations, in the state of their creation, to hold lands not occupied and used in, or necessary to, the exercise of their franchises, is based upon the idea that it might be prejudicial to the public interest of that state, to allow corporations to become speculators in lands, or to hold them in large amounts, keeping them out of market for an unreasonable time, and preventing improvement, etc.; but this objection could not well be urged in the state of their creation, against their holding lands in *other* states, taken in payments of debts justly due them, accruing in the course of their legitimate business. The state in which the land lies might, if it chose, object; but the state of their creation could not be interested in raising such objection; but so far as it was interested at all, it would seem to be in favor of sustaining the right; for, unless the creation and prosperous continuance of such corporations were supposed to be objects of public interest, which deserved to be fostered, it is not likely the state would have authorized their creation. The courts and public authorities of such state may, therefore, be presumed to look with favor upon such facilities afforded to their corporations for collecting the debts due them in other states. And if the case were reversed, and one of our corporations should take lands in the state of Indiana, in payment of a debt due them there, we should, without hesitation, say, "If Indiana makes no objection to this, we do not see how any public interest of Michigan, or its people, can be promoted by our refusing to allow the corporation to avail itself of the facility thus afforded for the collection of its debts."

We may, therefore, safely assume that the courts of Indiana would not refuse to recognize the right of this company to take lands in this state, in payment or security for debts due to it here.

But these considerations only go to show that the laws of Indiana present no obstacle to the taking or holding of these lands by the company; in other words, they show that, by the laws of Indiana, so far as the question depends upon them, this company was competent to take this land in this state.

But the laws of Indiana have no force or operation (as *laws,* giving powers, or creating or enforcing obligation) within the state of Michigan. No state has the power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises, in other states. It may confer powers, in the nature of a commission, to be exercised anywhere, upon condition, that their exercise be assented to by the state or sovereignty where their exercise is sought; but without this assent, express or implied, such powers would be nugatory outside of the state granting them. Each state, by its own legislature, must determine for itself all such questions of public policy arising within its limits.

But, upon the principle of comity, which is a part of the voluntary law of nations, recognized, to a greater or less extent, by all civilized governments, effect is frequently given in one state or country to the laws of another, in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with, or depending upon, such foreign laws, without which commercial and business intercourse between the people of different states and countries could scarcely exist.

And, among the states composing the federal union,—whose relations and intercourse are much more intimate than those of foreign states (properly so called), and the interests of whose citizens are so intermingled that, in commercial and business enterprises, state lines are scarcely more regarded by the people than county and township lines,—it is the common interest of all to encourage the recognition of those principles of state comity which tend to make us, in feeling and in interest, one homogeneous people, without limiting the independence of any states, and reserving to the people of each the sole rignt of regulating their own internal affairs, and of determining, at any time, through their legislation, what limits to the recognition of the laws of other states, public policy or the welfare of the people may require to be imposed. Such has been the general course and tendency of the judicial decisions in the several states.

Upon scarcely any subject has this comity been more generally admitted and administered than in reference to corporate rights and interests.

The rights which they have generally been allowed to enjoy, and the powers they have been allowed to exercise, in states other than that of their creation or domicil, have varied considerably, according to the nature and objects of the different corporations, and the corresponding differences in the mode of doing their corporate business. An insurance company in doing its business in another state, owing to the nature of the business itself (making contracts of insurance), would seem to be exercising through agents, its corporate franchises, in the same way as in the state of its creation, with the exception of corporation meetings and the strictly official action of its officers; and for this, as well as the prudential reason of protecting their citizens from imposition, and. perhaps, encouraging home companies, other states have quite generally required their compliance with certain rules and regulations fixed by the legislature, as conditions, upon which alone, they are allowed to do their business within such state. Such has been the case in reference to insurance companies in our own state; and somewhat similar regulations have sometimes been adopted in some states, with reference to a few other corporations. But there are many other corporations whose business is, in its nature, more of a local character, confined mainly within the state of its creation, and only incidentally making contracts or acquiring property in other states, in the course of carrying on their home business, and in such cases the legislatures of the latter have seldom interfered, or placed them under any restriction. And the rule seems to be generally and well settled that the corporate existence, rights of making and enforcing contracts, of acquiring property and transacting business (not requiring the exercise of official corporate action or franchises within the state), of a corporation created by the laws of one state, will be recognized and protected in another; subject only to the qualification, that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the state in which they are sought to be enjoyed or exercised, or prejudicial to the interests of such state or its citizens. With these limitations the rights above mentioned, of a corporation created in one state, are as clearly recognized and as generally enforced in another, as the individual rights of an inhabitant of one state are recognized and enforced in another, of which he is a non-resident; though such corporations cannot, of course, claim in another state, such recognition of corporate existence or rights, as a *citizen* of the state of its domicil, under the clause of the constitution which secures to the citizens of each state "all the privileges and immunities of citizens in the several states," as this would impair the independence of the several states, by depriving them of the right to regulate their own internal affairs, according to their own interests, and ideas of state policy.

A corporation, however, in any aspect in which it is here essential to consider it, is but an artificial person, whose strictly legal existence, by force of obligatory law, is confined to the state which has created it and endowed it with its powers, capacities, and rights; and it can only exercise those powers, capacities, and rights, in another state, by the permission, express or implied, of the sovereign or legisilative power of the latter, which must be its own judge how far, and upon what conditions, it is consistent with its own domestic policy, and the interests of its citizens, to accord such recognition. The mere right of a corporation to purchase and sell property, not being in its nature strictly a franchise, but a right existing equally in individuals without special grant, is very generally recognized in states other than those of its creation.

And, as well observed by Judge Story, in reference to questions of this kind (*Conflict of Laws, §§ 35 and 37*), fully approved by the supreme court of the United States, in *Bank of Augusta v. Earle, 13, Pet., 589:* "In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation" [or state] "which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided." See also *Runyan v. Coster's lessee, 14 Pet., 122; Bard v. Poole, 12 N. Y., 495*, and *Merrick v. Van Santvoord, 34 N. Y., 208.*

As it is not, then, the comity of the courts, but that of the state, and the question is upon the adoption or qualified adoption in this state, of the laws, or rather certain incidents growing out of the laws, of Indiana, it follows that the power of determining the question whether, and how far, or with what modification, or upon what conditions, the laws of that state, or any rights dependent upon them, shall be recognized here, belongs to the legislative or law making power of this state, and that the judiciary, whose province is only to declare, and not to make, the law, must be guided in their decision by the principle and policy adopted by the legislature of this state in reference to this question. And in ascertaining what this legislative policy is, we are to be guided not only by such express provisions as they have chosen to make, and the natural implication from them, but also by their silence, which may furnish as clear an indication of what that policy was intended to be, as can be drawn from what they *have expressed*; since, if they have made no provision at all upon the particular subject, or branch of the subject, or question involved, it may reasonably be inferred that they intended to adopt, and left to the courts to apply, the generally received principles of comity, and, to that extent, to adopt the foreign law, or rather to recognize the rights dependent upon such laws; and if they have chosen to leave the matter without any legislative provision, the case must be a very clear one indeed, which would authorize the courts to refuse such recognition, on the ground that it would be prejudicial to the interests of the state; since the legislature are the proper representatives of the public interest, and, having the exclusive power to determine what shall be the public policy of the state, if they have chosen to make no enactment upon the subject, it is natural to infer they omitted to do so because they thought it unnecessary, and that the generally recognized principles would be sufficient for such cases. None of the foregoing principles have been seriously questioned in this case, so far as they relate to the power and capacity of corporations, created in one state, to make and enforce contracts, and to acquire *personal* property in another.

But it is insisted that the question of the power or capacity to take the title to real estate, to hold and dispose of it, stands upon a different ground from that of acquiring personal property. There are undoubtedly some differences between personal and real property, in respect to the laws by which they are to be governed; but whether they affect the present case, remains to be seen. Thus, personal property generally follows the person of the owner, or, in other words, the right to, and the mode of acquiring and disposing of, personal property, are generally to be governed by the law of the domicil of the owner, while real estate, in every thing which pertains to the mode and validity of conveyance and transfer, depends upon the law of the place in which it is situated. But it would be entirely competent for each distinct sovereignty to adopt, in this respect, the same rule as to both kinds of property within its limits, if it though fit to do so; and it is by comity only, that personal property, in one state or country, is allowed to be governed by the laws of another. As to the mode of acquiring, and transferring, and transmitting, real estate, that comity has not been carried so far as to allow the foreign law to govern the mode or form of conveyance. And in most countries formerly, and in many even now, it has been the custom to establish their own peculiar rules governing the capacity of parties to take, or the parties capable of taking and transferring, real estate, while this has not been usual with reference to the capacity to take, hold, or transmit personal property. Thus, in England, and formerly in many of the United States, though aliens might take, they could not hold, land, if claimed by the king or the state, and could not transmit or convey it. But it is quite competent for any sovereignty or state to abolish this distinction, and to make the capacity the same in both cases, without any restriction upon either. This is precisely what has been done in this state, and in most of the other states of the Union. Our statute (*Rev. Stat. of 1846, ch. 66, sec. 35*) places aliens, whether residents of the state or not, upon the same footing in all respects, as native citizens of the state, or of the United States, in reference to the right to acquire, hold, convey and transmit lands. And the constitution prohibits the legislature from establishing any less liberal rule, as to such aliens as are or may be residents of the state.—*Art. XVIII.,* § *13.* All persons alike, therefore, without reference to nationality, race, color, sex or age, who in this state are competent to take, hold, convey, or transmit personal property, can do the same with real estate. The rule is general as to both, and legislative action would be required to create an exception as to either. In fact, lands, in all the western states at least, have become about as much articles of trade and commerce, as goods or other personal property, and it has been the policy of most of them to encourage this traffic, and to facilitate the acquisition and transfer of real estate.

Among the powers or capacities incident to a corporation at common law, without any special mention in their charter, was that of taking, holding and conveying lands; and these incidents still remain even in this country, where charters are granted only by the legislature; subject only to such restrictions as the legislature has seen fit to impose, by express provision or tacit implication. The act of incorporation, in effect, gives to the corporation substantially the powers and faculties of a natural person, except as they are in some way restrained by the act of incorporation, or some other law of the state creating it.

When, therefore, a corporation is created in the state of Indiana, with powers, so far as that state can give them, of taking, holding and conveying lands in this state, I do not see upon what principle it can be held that an affirmative enabling act in this state is necessary to give them the capacity to take, hold and convey such lands here, unless our legislature have, expressly or by implication, forbidden it. The question of capacity seems to me to rest upon the principles of comity, as much as their capacity to make or enforce contracts, or to acquire, hold or convey personal property. I say the question seems to me to rest upon the same principles, but by this I do not mean that there may not be stronger reasons against recognizing that capacity as to land, than as to personal property; but these are all reasons of public policy which bear upon the question of comity, and, therefore, more appropriate for the legislature than the courts. Thus the main, if not the only, evils to be apprehended from allowing corporations, domestic or foreign, to take, hold, or convey lands are: 1st,—The danger of their becoming speculators in lands to large amounts, keeping them unimproved and thereby retarding the progress of settlement and improvement, or, if improved, preventing settlers from obtaining clear or independent titles, and introducing a system of tenancies in which the tenants would be, in a great measure, dependent upon such corporations; 2d,—The holding of such lands for a long period of time, as they pass by perpetual succession without any change or break by death, as in the case of natural persons; and 3d,—The influence which wealthy corporations, holding large bodies of land in the state, might exercise upon the legislature. These considerations apply with no peculiar force to railroad corporations as such, but equally to banking, manufacturing, insurance or other corporations; and they are all very proper considerations for a constitutional convention, in framing the fundamental law, and for the people in adopting it, as well as for the legislature, who, in all matters not fixed by the constitution, are properly vested with the power of determining the public policy. And in a case where it should very clearly appear to the court from the amount of the lands purchased, or the purpose for which they were purchased, or other circumstances, that the dangers I have mentioned were seriously to be apprehended, it may be (though the present case does not call for an opinion upon this point), that the court would be authorized, without any legislative prohibition to that end, to refuse to recognize the law of the state creating the corporation, or so much of it as had undertaken to confer the right of holding such lands; and, consequently, to treat the conveyance as void for want of such capacity. But when, from the nature of the case, no such danger can be reasonably apprehended, I see no very intelligible ground upon which the court could thus treat the conveyance as void, unless the legislative department, in some way, have clearly indicated a policy which requires it.

In accordance with the principles already explained, it was held in *State v. Boston, Concord & Montreal R. R. Co., 25 Vt., 433* (Judge Redfield giving the opinion), that a railroad company, chartered in the state of New Hampshire, had the right and the capacity to purchase lands in the state of Vermont, without any act of the latter state affirmatively authorizing it; though the land was not taken in payment of, or security for, a debt due the company, but for the purpose of being used in connection with their road, if it should ever be connected with a road authorized in the latter state. And it may, or may not, also legitimately result from the principles I have already expressed, that in the case now before us, the Fort Wayne & Chicago railroad company had the capacity to take this land by the conveyance from Johnson, and to hold and convey the same, though the conveyance were shown to have been made to the company in consideration and in payment of Johnson's subscription to the stock of the company; inasmuch as the statute of Indiana, which gave the authority to receive the land for stock, also required the lands thus received to be sold within a reasonable time, and the proceeds applied for the construction of their road and its appurtenances; and it must naturally be supposed to have been for the interest of the company to make an early sale, without which the stock subscribed and for which the land was received, could not be rendered available; and the courts of Indiana have by judicial decision fixed the "reasonable time" within which a sale of such lands should be made, at ten years (*15 Ind., 459*), in exact accordance with the provision of our constitution (which took effect Jan. 1, 1851), which provides that, "No corporation shall hold any real estate hereafter acquired, for a longer period than ten years, except such real estate as shall be actually occupied by such corporation in the exercise of its franchises,"—a provision which goes upon the assumption or admission that real estate, though not actually occupied by a corporation in the exercise of its franchises, *may hereafter be acquired,* and applies to no other.

But I express no opinion in this case, upon the question, what would be the effect of the conveyance by Johnson to the company, if made in consideration of, or in payment for, stock. This question is not involved in the case. The record does not show that such was the consideration of that conveyance, nor, in fact, what the consideration was, except that the deed expresses upon its face the consideration of sixteen hundred dollars. But this is equally consistent with the fact, that the conveyance was made in payment of a debt, due from Johnson to the company, as that it was paid in any other way. Now, as it does not appear from the record that the conveyance was made in payment for stock, nor what was the actual consideration for, or purpose of, the conveyance, and we are not allowed to presume illegality, but must presume the transaction to have been legal till the contrary is shown; if the deed would have been void for want of capacity to take, if given for one species of consideration, or for one purpose, but the company had capacity to take, and the deed would be valid, if made for any other consideration or purpose, we are bound to presume that it was made for the consideration and for the purpose, for which the company had the right and capacity to take it; and consequently the conveyance must be held valid, if it was legally possible for the company to take the title, for *any purpose* or upon any consideration *whatever.—Regents of the University v. Detroit Young Men's Society, 12 Mich., 138.*

If, therefore, this company had the power or capacity to take this land, in satisfaction of a debt due it from Johnson, accruing in the legitimate prosecution of its business, the conveyance must be held valid, and the company must be held to have had the capacity to take the title and the power to convey it.

Now, whatever danger might be apprehended from allowing corporations of other states to take lands for stock, or for purposes of speculation, I cannot conceive that the privilege of taking lands, in good faith, in payment of debts, and which must, therefore, be merely occasional, and with the intention and for the purpose of converting them into money for the realization of the proceeds, can be so dangerous to the public interest of this state or its citizens, as to authorize the courts to declare such conveyance void, on that ground; especially as the property could only be held for ten years, under the constitutional provision already cited. And I think it may be laid down as a safe and sound principle that, unless the constitution of the state, or its legislature, have, either expressly or by clear implication, declared a contrary rule, the courts of any state are bound to recognize this right of the corporations of other states, thus to realize and collect the debts due to them; and such seems to have been the course of decisions in the several states where this question has arisen. See *Silver Lake Bank v. North, 4 John. Ch., 370; Lumbard v. Aldrich,* 8 *N. H., 31; New York Dry Dock v. Hicks, 5 McLean, 111; Lathrop v. Commercial Bank of Scioto, 8 Dana, 114.* Though in the first and the last of the cases above cited, the question arose upon a mortgage to such corporation, yet, in Kentucky certainly, a mortgage conveys the legal title; and, therefore, the question is the same as here; and I think the same may be said of the law of New York, when the mortgage was executed, which came in question in the case first above cited. In the other cases the question arises directly upon the power to take the title.

Most of these decisions expressly, and the others tacitly, go upon the ground that, inasmuch as corporations have the right to make contracts in states other than that of their creation, and to enforce them in the courts of such states (a right not disputed in the present case), in the same manner as an individual of another state is allowed to contract and to sue, they must, in the absence of any legislation to the contrary, be allowed to enforce their judgments in the same way, and have the right to avail themselves of all the same means and facilities for that purpose; and, consequently, that where the individual has the right to obtain the title to lands under execution, the same right must be accorded to such corporations; and that, having the right thus to acquire the title by the compulsory means of an execution, the debtor may, by voluntary agreement, do what, without his consent, the law would compel; and that he may, therefore, convey, by his own deed, the title which, if he had not thus conveyed, the law would, by its process, have conveyed in spite of him. It is true, as to the case cited from New Hampshire (*Lumbard v. Aldrich, ubi supra*), the law of that state did not (at that time, at least), permit a *sale* of land, upon execution to the highest bidder, but the proceeding was by appraisal, and setting off to the creditor,—in other words, by extent,—by which none but the creditor could take the title (See *Morse v. Child, et al., 7 N. H., 583, etc.*) ; and in this case the reasoning above adverted to, was, therefore, absolutely conclusive, if the right to sue in the courts of New Hampshire, were admitted or shown. But in the other cases cited, the land might be sold on execution or decree, to the highest bidder, as in this state; and yet the same course of reasoning was held to apply; and I think properly so held; for, though the law in this state, for instance, requires a sale of land upon execution, at which any person, as well as the creditor can bid; yet, in a question of the kind now before us, we ought to take a practical, rather than a mere theoretical, view of the question; and we know, as a matter of fact, that, while the law requires a sale to the highest bidder, there is not one case in fifty, of a sale upon execution, subject as it is to redemption, in which a sale can be made for any reasonable price, if at all, except to the creditor; and, consequently, the creditor is almost always compelled to bid off the land, or lose his debt, or most of it; and it is, or should be, the policy of the law to have the property sell for its real value, or as near it as may be, which can seldom happen, except when sold to the creditor himself.

This power of foreign corporations to take lands in payment of debts, has not, so far as I have been able to find, been anywhere treated as one which is in any way dangerous to the citizens, or inconsistent with the public policy of any state; and I have been unable to find a single decided case, in which the question was directly involved, where the power has been denied; and I am not willing to take the lead in establishing a contrary doctrine—a doctrine which, in its injustice, narrowness and illiberality, if not inhospitality, may have much to commend it to Chinese exclusiveness, but nothing in harmony with the liberal spirit of American commercial intercourse.

But we have ourselves, in this court, already held that a foreign banking corporation may take the title to lands in this state, in payment of debts, and impliedly that such corporation may sell such land.—See *Ives v. Bank of Lansingburgh, 12 Mich., 361*, a case which arose since our present constitution. And we have in several instances recognized the right of such foreign corporations, as *cestui que trusts,* when the legal title was vested in a trustee.—See *Trask v. Green, 9 Mich.,* 358; *Taylor v. Boardman, 24 Mich., 287;* and, so far as affects any question of state policy, or danger to be apprehended from foreign corporations owning lands in this state, or any question of comity, I can see no difference between the recognition of such equitable interest, and the legal estate; since the corporation would ordinarily, in both cases alike, control the land. And, in every case of a naked trust, the statute itself executes the trust and places the legal estate in the *cestui que trust.—Rev. Sat. 1846, ch. 63,* § 3.

Now, as already remarked, there is nothing peculiar to railroad corporations, so far as any question of comity, or danger, or prejudice to the interests of the people or the public interests, is involved. But all the same objections of this nature would apply as well and as strongly in the case of a foreign banking, as a foreign railroad, corporation; so that I think the question in the present case may be looked upon as decided in favor of the right of this company to take this land in payment of a debt, unless we shall find some legislative prohibition.

It remains, therefore, only to see whether such prohibition is to be found in our statutes. The only provisions to be found in our statutes expressly in reference to foreign corporations, which can be claimed to have any bearing upon the question, are the following, which I think do not tend to negative the rule which I have endeavored to show is the rule of comity: *Section 1 of chapter 116 of the Rev. Statutes of 1846 (Comp. L. 1857,* § *4833)* provides: "A foreign corporation, created by the laws of any other state or country, may prosecute in the courts of this state, in the same manner as corporations created under the laws of this state, upon giving security for the payment of the costs of suit, in the same manner that non-residents are required by law to do."

This section, instead of rejecting or modifying the rule of comity, expressly adopts the substance of that rule, so far as the enactment extends, and goes only to confirm the conclusions at which I have arrived.

The next section provides: "But when, by the laws of this state, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of ,or made or entered into in consideration of such act."

This section applies only to acts which, by the laws of this state, are forbidden to be done "by any corporation or association of individuals, without *express* authority of law." It does not apply at all to cases where only some particular corporation, or even a particular class of corporations, is forbidden by the laws of this state to do certain things, but only to cases where such prohibition is general, applying to all corporations and all associations of individuals, in this state. It puts the foreign corporations, in all the enumerated particulars, upon the same footing as domestic corporations are placed by those state laws, and *those only,* which apply *generally to all* the corporations in the state, but not as some particular corporation or class of corporations may be placed by some law specially applicable to them.

This again is, I think, the proper and generally recognized measure of state comity. A subsequent section makes provision for attachment against foreign corporations. These are all the provisions to be found in our statutes, at the time of this conveyance, having express reference to foreign corporations, which have any possible bearing upon the question here involved.

If we look to the several separate acts of incorporation in force at the time, and endeavor to extract from them a legislative policy in reference to our own domestic corporations, as to the power or capacity in question, we shall find that, owing to the great variety and dissimilarity of the several acts in this respect, no reasonably certain or satisfactory conclusion can be drawn; and no court can safely declare a state or legislative policy upon grounds so utterly unstable and conjectural. Some of these acts gave express power to take and dispose of real and personal estate without any restriction whatever, leaving them exactly upon the same footing as corporations at common law; others allowed them to hold and dispose of real estate up to a certain amount in value; others limited the right by the quantity of acres; some of them restricted the right to such lands as might be required for the proper corporation buildings and such as might be taken or conveyed to it in payment, satisfaction or security for debts due the corporation; some neither expressly gave or restricted the power to take lands, and left the corporation with all the common-law incidents in this respect; and others were very restrictive in confining the right to such lands only as were used in the exercise of their corporate franchises. Under many of them, perhaps most of them, the right to take lands in payment of debts in good faith accruing to the corporation in the prosecution of their business, would be very clear; since this would follow as an incident to any corporation, unless in some way restrained by the charter. It may be true, as a general observation, that the railroad charters granted in the state were more restrictive, in this respect, than those of several other species; but, as I have already shown, so far as material to the question of comity, and what rights of *foreign* corporations are to be recognized, no distinction in principle can be made between railroad, and other, corporations; and if the latter have been made more restrictive, as an average, it has been for reasons foreign to the question here involved.

Bearing in mind the great variety and discrepancy, in this respect, in the great number of separate charters or acts of incorporation, as well those granted prior, as those subsequent, to *chapter 55, of the Revised Statutes of 1846*, let us examine the seventh section of the chapter, remembering, however, that it was not competent for the legislature, by these general provisions, to take away from any previously existing corporation any corporate right granted by the charter, and that it was equally incompetent, by any of these provisions, to tie the hands of future legislatures, should they see fit to make any different provisions either in a special charter or by general law. *Section seven,* which, by its context, applies generally to all corporations, created or to be created, in this state, declares: "Every such corporation may hold land to an amount authorized by law, and may convey the same." There is no possible view in which this provision was *necessary* for *any* purpose. But we are bound so to construe it, if possible, as not to make it pure nonsense. This provision, of itself, neither gives nor takes away any power whatever. It merely recognizes such powers as any such corporation then had, or might thereafter have, "by law." If, by the terms, "may hold land to an amount authorized by law," we are to understand such lands only as, by *express provision of statute,* they were authorized to hold, then, it has no possible force or operation whatever, and its insertion was sheer nonsense; for, in such case, the corporation would take their authority from the statute conferring it, and not from *this general* provision, which can neither add to, nor take from, its force; and, upon this theory of interpretation, no possible object could have existed for its enactment. When a statute expressly confers a right, it does not need another statute to declare, or to give it, its effect. But if the term, "authorized by law," were intended to include those incidental powers or rights to hold lands, which result, as common-law incidents, from the creation of a corporation, without being expressed, so far as such incidents were not restrained by the legislature; then, though the statute was not necessary, it is not so purely nonsensical as it would be upon the other interpretation; as it may be treated as a declaratory statute merely. It is in this sense, and this only, that it can have any supposable or possible effect upon, or application to, the various corporations then existing, or thereafter to be created. In effect, therefore, when applied to such corporations, in the light of the existing statutes and the common law, the provision is nothing more than a declaration, that corporations might hold and convey lands, wherever this common-law right was in no way restrained by the legislature.

I find no other statute, then in force, which can have any possible bearing upon the question. The legislature have, in no respect material to the present case, adopted any policy, or enacted any statute, modifying the generally received doctrine of comity. And I think the company had the capacity to take, and did take, the title to the lands, and that their deed, with that of McCullough, the mortgagee and trustee, conveyed the title to the plaintiff; that the court erred in charging to the contrary, and that the judgment should be reversed, with costs, and a new trial awarded.

COOLEY, J., concurred.

MUTUAL LIFE INS. CO. v. SPRATLEY, 172 U. S. 602, (1899).

The case is stated in the opinion.

Mr. B. M. Estes, with whom was *Mr. Francis Fentress* on the brief, for plaintiff in error.

Mr. Thomas B. Turley and *Mr. Luke E. Wright* for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error filed its bill against the defendant in error in the chancery court of Shelby County, Tennessee, for the purpose of enjoining her from taking any proceedings under a judgment by default which she had obtained in the State of Tennessee, against the corporation, upon certain policies of insurance, and also for the purpose of obtaining a decree pronouncing the judgment void and releasing the corporation therefrom. * * *

The corporation is a life insurance company, incorporated under the laws of, and having its principal office in, the State of Connecticut. It did a life insurance business in the State of Tennessee from February 1, 1870, until July 1, 1894. * * * On July 1, 1894, the company ceased issuing any new policies in the State of Tennessee, and withdrew its agents from the State. It had, however, a number of policies, other than those issued on the life of Mr. Spratley, outstanding in the State at the time it withdrew, (how many is not stated,) and it continued to receive the premiums on these policies through its former agent for that State, and to settle, by payment or otherwise, the claims upon policies in that State as they fell due. * * * * * *

Mr. Spratley died in the city of Memphis, in the State of Tennessee, on the 28th of February, 1896, leaving his widow, the defendant in error, surviving him. The two policies were in force at the time of his death. The company sent its agent to Memphis to act under its instructions in the investigation and adjustment of the claim. Mr. Chaffee was the agent employed, and he had been employed in the service of the company since the first day of July, 1887. * * * * * * * * * * *

The company sent Mr. Chaffee specially to the State of Tennessee for the purpose of investigating into the circumstances of the death of Mr. Spratley and into the merits of the claim made by Mrs. Spratley, and while there he was authorized by the company to compromise the claim made by her upon terms stated in a telegram from the vice president of the company. While Mr. Chaffee was engaged in negotiations with Mrs. Spratley and her brother in relation to her claims, and after she had refused to accept the compromise offered by him in behalf of the company, and on April 15, 1896, he was served, in Memphis, with process against the corporation in an action upon the policies above mentioned. * * * * * * * * * *

On July 2, 1896, judgment by default was entered against the defendant. * * * * * * * * *

A statute of Tennessee provided that process may be served upon any agent of the corporation, found within the county where the suit is brought, no matter what character of agent such person may be. * * * * * * * * * *

The Federal question with which we are now concerned is whether the court obtained jurisdiction to render judgment in the case against the company so that to enforce it would not be taking the property of the company without due process of law. Even though we might be unprepared to say that a service of process upon "any agent," found within the countv, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether upon the facts of this case the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. If it were, there was due process of law, whatever we might think of the other provisions of the act in relation to the service upon any agent of a corporation, no matter what character of agent the person might be. If the person upon whom process was served in this case was a proper agent of the company, it is immaterial whether the statute of the State also permits a service to be made on some other character of agent which we might not think sufficiently representative to give the court jurisdiction over the corporation. If the service be sufficient in this instance, the corporation could not herein raise the question whether it would be sufficient in some other and different case coming under the provision of the state statute.

In a suit where no property of a corporation is within the State, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the State; *Goldey* v. *Morning News,* 156 U. S. 519; *Merchants' Manufacturing Co.* v. *Grand Trunk Railway Co.,* 13 Fed. Rep. 358; and if so, the service of process must be upon some agent so far representing the corporation in the State that he may properly be held in law an agent to receive such process in behalf of the corporation. An express authority to receive process is not always necessary.

We think the evidence in this case shows that the company was doing business within the State at the time of this service of process. From 1870 until 1894, it had done an active business throughout the State by its agents therein, and had issued policies of insurance upon the lives of citizens of the State. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the State, was simply a recall of its agents doing business therein, the giving of a notice to the state insurance commissioner, and a refusal to take any new risks or to issue any new policies within the State. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent.

The corporation alleged in its bill filed in this suit that the defendant herein was taking garnishee proceedings against its policy holders in the State for the purpose of collecting, as far as possible, the amount of the judgment she had obtained against the corporation, and it gave in its bill the names of some thirteen of such policyholders against whom proceedings had been taken by this defendant. It cannot be said with truth, as we think, that an insurance company does no business within a State unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the State through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policyholders to an agent residing in another State, and who was once the agent in the State where the policyholders resided. This action on the part of the company constitutes doing business within the State, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis.

It is admitted that the person upon whom process was served was an agent of the company. Was he sufficiently representative in his character? He was sent into the State as such agent to investigate in regard to this very claim, and while there he was empowered to compromise it within certain stated terms, leaving him a certain discretion as to the amount. He was authorized to settle the claim for the amount of the reserve "or thereabouts." He did not leave his character as agent when he entered the State. On the contrary, it was as agent, and for the purpose of representing the company therein, that he entered the State, and as agent he was seeking a compromise of the claim by the authority of the company, and therein representing it. Why was he not such an agent as it would be proper to serve process upon? He had been appointed an agent by the company; his whole time and services were given to the company under an appointment made years previously; he received a salary from the company not dependent upon any particular service at any particular time. The company having issued policies upon the life of an individual who had died, and a claim having been made for payment in accordance with the terms of those policies, the company clothed him with authority to go into the State and in its behalf investigate the facts surrounding the claim, and authority was given him to compromise it upon terms which left to him discretion to some extent as to the amount of payment. He was not a mere agent appointed for each particular case. He was employed generally, by the company, to act in its behalf in all cases of this kind and as directed by the company in each case. Entering the State with this authority, and acting in this capacity, the company itself doing business within the State, it seems to us that he sufficiently represented the company within the principle which calls for the service of process upon a person who is in reality sufficient of a representative to give the court jurisdiction over the company he represents. In view of all the facts, we think it a proper case in which the law would imply, from his appointment and authority, the power to receive service of process in the case which he was attending to.

Taken in connection with the further fact of sending (as provided for in the statute) a copy of the process and notice thereof by registered letter to the home office of the company, and also the personal service upon the company of a copy of the process and notice thereof at its home office, it must be admitted that one of the chief objects of all such kinds of service, namely, notice and knowledge on the part of the company of the commencement of suit against it, is certainly provided for. We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service on the agent in the State where suit was commenced, but we refer to it as a part of the facts in the case.

In *Lafayette Insurance Company* v. *French,* 18 How. 404, 407, it appeared that a statute of Ohio made provision for service of process on foreign insurance companies in suits founded upon contracts of insurance there made by them with citizens of that State. One of those provisions was that service of process on a resident agent of a foreign corporation should be as effectual as though the same was served upon the principal. In a suit commenced in Ohio against a foreign corporation by service upon its resident agent, the company objected to the validity of that service, and that question came before this court, and Mr. Justice Curtis, in delivering the opinion of the court, said:

"We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed. Nor do we think the means adopted to effect this object are open to the objection that it is an attempt improperly to extend the jurisdiction of the State beyond its own limits to a person in another State. Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent. Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts; and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the corporation there in respect to such service; and notice to him was notice to the corporation which he there represented, and for whom he was empowered to take notice."

The act did not provide for an express consent to receive such service, on the part of the company. The consent was implied because of the company entering the State and doing business therein subject to the provisions of the act.

It is true that in the above case the person upon whom service of process was made is stated to have been a resident agent of the company; but the mere fact of residence is not material, (other things being sufficient,) provided he was in the State representing the company and clothed with power as an agent of the company to so represent it. His agency might be sufficient in such event, although he was not a resident of the State. It is also true that the agent in that case was an agent with power to make contracts of insurance in behalf of the corporation in that State, and from that fact in connection with the statute, the court inferred the further fact of an implied power to receive service of process in behalf of the corporation. The agent had not, so far as the case shows, received any express authority from the company to receive service of process. The court does not hold nor is it intimated that none but an agent who has authority to make contracts of insurance in behalf of the company could be held to represent it for the purpose of service of process upon it. It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character of agent employed. And while the court held that an agent with power to contract was, in legal contemplation, clothed with power to receive notice for and on behalf of the corporation as effectually as if he were designated in the charter as the officer upon whom process was to be served, we think it is not an unnatural or an improper inference, from the facts in the case at bar, to infer a power on the part of this agent, thus sent into the State by the company, to receive notice on its behalf in the same manner and to the same extent that the agent in the case cited was assumed to have. In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him. The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.

This case is unlike that of *St. Clair* v. *Cox,* 106 U. S. 350. There the record of the judgment, which was held to have been properly excluded, did not (and there is no evidence which did) show that the corporation was doing business in the State at the time of the service of process on the person said to be its agent. Nor did it appear that the person upon whom the process was served bore such relations to the corporation as would justify the service upon him as its agent. In the course of the opinion in that case, Mr. Justice Field, speaking for the court, said:

"It is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or in the finding of the court—that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, and a certificate of service of process by the proper officer on a person who is its agent there, would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

Here we have the essentials named in the above extract from the opinion of the court in *St. Clair* v. *Cox*. We have a foreign corporation doing business in the State of Tennessee. We have its agent present within the State, representing it by its authority in regard to the very claim in dispute, and with authority to compromise it within certain limits, and his general authority not limited to a particular transaction. On the contrary, as seen from his written appointment, his agency for the company was a continuous one, and had been such since 1887, although, of course, his agency was limited to a certain department of the business of the corporation.

The case does not hold that a foreign corporation cannot be sued in any State unless it be doing business there and has appointed an agent expressly that process might be served upon him for it. Speaking of the service of process upon an agent, the learned justice thus continued:

"In the State where a corporation is formed, it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the State will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them, to manage its business. But the moment the boundary of the State is passed difficulties arise; it is not so easy to determine who represents the corporation there, and under what circumstances service on them will bind it."

This language does not confine the service to an agent who has been expressly authorized to receive service of process upon him in behalf of the foreign corporation. If that were true, it would be easy enough to determine whether the person represented the corporation, as unless he had been so authorized he would not be its agent in that matter. In the absence of any express authority, the question depends upon a review of the surrounding facts and upon the inferences which the court might properly draw from them. If it appear that there is a law of the State in respect to the service of process on foreign corporations and that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient.

It was held in *Pennoyer* v. *Neff*, 95 U. S. 714, that a service by publication in an action *in personam* against an individual, where the defendant was a non-resident and had no property within the State, and the suit was brought simply to determine his personal rights and obligations, was ineffectual for any purpose. The case has no bearing upon the question here presented.

In *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194, it was held that the person upon whom process was served in the State of Texas was not a "local agent" within the meaning of that term as contained in the Texas statute. It was also held that the special appearance of the company for the purpose of objecting that the service of process was not good did not, in the Federal courts, confer jurisdiction as in case of a general appearance. There is nothing in the case affecting this question.

In *Maxwell* v. *Atchison, Texas &c. Railroad,* 34 Fed. Rep. 286, the opinion in which was delivered by Judge Brown, United States District Judge of Michigan, now one of the Justices of this court, the decision was placed upon the ground that the business which the defendant carried on in Michigan was not of such a character as to make it amenable to suits within that jurisdiction, especially where the cause of action in the case arose within the State of Kansas, and the court also held that the individual upon whom the process was served was not an officer or managing agent of the railroad company within the meaning of the act of the legislature, nor was he even a ticket agent of the company; that he was a mere runner, and that service of process upon him for a cause of action arising in Kansas gave no jurisdiction to the court.

In *United States* v. *American Bell Telephone Co.,* 29 Fed. Rep. 17, Judge Jackson stated the three conditions necessary to give a court jurisdiction *in personam* over a foreign corporation: First, it must appear that the corporation was carrying on its business in the State where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such State; third, the existence of some local law making such corporation amenable to suit there as a condition, express or implied, of doing business in the State.

In this case the company was doing business in the State. The agent was in the State under the authority and by the appointment of the company. He was authorized to inquire into and compromise the particular matters in dispute between the corporation and the policyholder, and he was no mere special employé engaged by the company for this particular purpose. And there was a local law, that of 1887, providing for service. It has been recently held in this court that as to a Circuit Court of the United States, where a corporation is doing business in a State other than the one of its incorporation, service may sometimes be made upon its regularly appointed agents there, even in the absence of a state statute conferring such authority. *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100.

Although the legislature, by the act of 1875, provided for service of process upon a particular person, (the secretary of state,) in behalf of a foreign corporation, and the company had, pursuant to the provisions of the act, duly appointed that officer its agent to receive process for it, nevertheless the legislature provided, by law in 1887, for service upon other agents, and the company continued thereafter to do business in the State. Continuing to do business, the company impliedly assented to the terms of that statute, at least to the extent of consenting to the service of process upon an agent so far representative in character that the law would imply authority on his part to receive such service within the State. *Merchants' Manufacturing Co.* v. *Grand Trunk Railway,* 13 Fed. Rep. 358, 359. When the service of which plaintiff in error complains was made, the act of 1875 had been repealed by chapter 160 of the laws of 1895, and the company had never appointed an agent under chapter 166 of the laws of that year. There was, therefore, no one upon whom process could be served in behalf of the company, excepting under the act of 1887, unless the plaintiff in error be right in the claim that, by appointing the secretary of state its agent to receive process under the act of 1875, a contract was created, and the secretary of state remained such agent, notwithstanding subsequent statutes regulating the subject, or even repealing the act. We will refer to that claim hereafter. If by the statute of the State provision were made for the appointment of an agent by the company, upon whom process might be served, and the company had appointed such an agent, and there was no other statute authorizing service of process upon an agent of the company other than the one so appointed, we do not say that service upon any other agent of the company would be good. This is not such a case, and the question is not here open for discussion.

A vast mass of business is now done throughout the country by corporations which are chartered by States other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the State where the business was done, out of which the dispute arises.

It was well said in *Railroad Company* v. *Harris,* 12 Wall. 65, 83, by Mr. Justice Swayne, in speaking for the court, in regard to service on an agent, that "When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility." The court in view of these facts was of opinion that Congress intended no such result.

In holding the service of process upon this particular agent sufficient in this instance and so far as the character of the agent is concerned, we do not, as we have already intimated, hold that service upon any agent mentioned in the act of 1887 would be good. That question is not before us.

Upon the question relative to the alleged creation of a contract between the State and the company, by the appointment of the secretary of state as its agent under the act of 1875, to receive process for it, we have no doubt.

The act of 1875 stated the terms, upon compliance with which a foreign corporation should be permitted to do business within the State of Tennessee. There was however no contract that those conditions should never be altered, and when pursuant to the provisions of the act of 1875 this power of attorney was given by the corporation, the State did not thereby contract that during all of the period within which the company might do business within that State no alteration or modification should be made regarding the conditions as to the service of process upon the company. When therefore in 1887 the legislature passed another act and therein provided for the service of process, no contract between the State and the corporation was violated thereby, or any of its obligations in anywise impaired, for the reason that no contract had ever existed. Instead of a contract, it was a mere license given by the State to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the State was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the State and the foreign corporation doing business within its borders under the former act.

Statutes of this kind reflect and execute the general policy of the State upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. *Douglas* v. *Kentucky,* 168 U. S. 488. The cases showing the right of a State to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in *Hooper* v. *California,* 155 U. S. 648, 652.

Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the State, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed "governmental subjects," and hence within the category which permits the legislature of a State to legislate upon those subjects from time to time as the public interests may seem to it to require.

As these statutes involve public interests, legislation regarding them are necessarily public laws, and as stated in *Newton* v. *Commissioners,* 100 U. S. 548, 559; "Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

The same principle is found in the following cases: *Fertilizing Company* v. *Hyde Park,* 97 U. S. 659; *Butchers' Union Company* v. *Crescent City,* 111 U. S. 746; *Boyd* v. *Alabama,* 94 U. S. 645; *Douglas* v. *Kentucky,* 168 U. S. 488.

When the legislature of Tennessee therefore permitted the company to do business within its State on appointing an agent therein upon whom process might be served, and when in pursuance of such provisions the company entered the State and appointed the agent, no contract was thereby created which would prevent the State from thereafter passing another statute in regard to service of process, and making such statute applicable to a company already doing business in the State. In other words, no contract was created by the fact that the company availed itself of the permission to do business within the State under the provisions of the act of 1875.

Upon the case as presented in this record, we are of opinion that the service upon the person in question was a good service in behalf of the corporation. The judgment of the Supreme Court of Tennessee is therefore

Affirmed.

IMMOVABLES.

BAUM v. BIRCHALL, 150 PA. ST. 164, (1892).

OPINION BY MR. JUSTICE WILLIAMS July 13, 1892.

The defendants are and were at the date of the bond on which this judgment was entered husband and wife. In the winter of 1884-5 they lived in this state near Philadelphia. Desiring to remove to Delaware they visited Dover and its vicinity in February in 1885 in search of a suitable farm on which to make their home. Among the farms examined by them was that of Baum the plaintiff, from whom they got the price and terms of payment at which he would sell. They then returned to their home near Philadelphia; but H. C. Birchall, the husband, soon after returned to Dover and in the name, and by the direction, of his wife made a contract with Baum for his farm and paid one hundred dollars hand-money upon it. It was to be closed as soon as the title papers could be conveniently prepared, pending which Birchall came back to his home in this state. Soon after, a bond and mortgage to secure so much of the purchase money due Baum as was not to be paid on delivery of the deed, were sent by mail to the Birchalls for execution. Both instruments were duly signed and sealed in this state, after which Birchall took them, together with his wife's check for five thousand dollars, the amount to be paid in hand, and went to Dover to meet Baum and complete the transaction. He received the deed made to his wife, delivered for her the check for five thousand dollars and the bond and mortgage to secure the balance of the purchase money. Soon after, the Birchalls removed to their new home and continued to reside on the farm for one and a half years, when they sold it subject to the mortgage and returned to this state. Their vendee did not pay principal or interest upon the mortgage, and, as the result of legal proceedings upon it, the farm was brought to sale by the sheriff. The proceeds of the sale were not enough to pay the mortgage debt, and this judgment was entered upon the bond for the purpose of collecting from Mrs. Birchall, in this state, the balance still due on the purchase money of the farm. She then made application to open it on the ground that the fact of her having signed the bond in this state made it a Pennsylvania contract; and that because of her disability it could not be enforced against her except as to the land of which it was part of the purchase money. The court below so held and the correctness of this ruling is the only question presented by this appeal.

If it be conceded that the bond and mortgage were executed in this state, yet it appears upon their face that they were to be performed in the state of Delaware, and the general rule is that in such cases the instrument is governed as to its validity, nature, obligation and interpretation, by the laws of the place where it is to be performed: Story on the Conflict of Laws, § 280; 2 Kent's Com., 459. Interest, which is the ordinary measure of compensation for delay in performance, is to be computed according to the law of the place of payment: Brown v. Camden and Atlantic Railroad Co., 83 Pa. 316. The remedy and the effect to be given to any existing disability in the maker of the instrument are also to be determined by the law of the place of payment: Hill v. Chase, 143 Mass. 129. The same rule applies where the contract is made by correspondence through the mails or by telegraph. Thus it was held that if one orders goods from another state by mail, which are sent by a carrier, the contract is made where the order is received and the goods delivered to the carrier for the buyer; and the law of that state will govern the contract: Milliken v. Pratt, 125 Mass. 374. The courts of this state will administer in such cases the *lex loci contractus* as against one under disability: Evans v. Cleary, 125 Pa. 204. But this case stands on still stronger ground. Delivery is an essential part of the execution of any instrument. It is not enough to sign and seal a bond. It is effectual only when it is delivered to the party interested in it, or to some one for him. The bond might have been signed wherever it was most convenient for the obligor to give attention to it, but it was an ineffectual and useless paper until delivery to the obligor. The delivery was made in Delaware where it was to be performed. It was made a binding obligation, its execution was completed in that state, and for this further reason it must be governed by the laws of that state.

So far we have considered the instrument as a contract without regard to the character of the subject-matter; but, upon looking into the transaction of which it is a part, we learn that it is a contract relating to real property. Now, the rule relating to such contracts has been well settled from the earliest days of the English common law. Real property cannot attend the person of the owner as he goes from one jurisdiction to another. It is fixed, immovable and necessarily under the law of the place where it lies. Contracts relating to it must therefore necessarily be governed by the *lex rei sitae:* Story on the Conflict of Laws, 424. It seems that the law of the state where Baum's farm was located makes a married woman personally liable on her bond given for property bought by her. Mrs. Birchall went there to look at and treat for this farm. She contracted for it through her husband in that state. She received her deed and delivered her money, her bond and mortgage, in complete execution of her contract there where the land was. The law of that state determines the effect of the conveyance received by her, and of the bond and mortgage given by her to secure the purchase price of the land she bought. We have therefore a contract made and, in legal effect, delivered in Delaware; for the purchase of real property in that state; upon which according to the laws of that state the defendant is personally liable notwithstanding her coverture. In passing upon it here, our courts will secure to her the advantages, and enforce against her the obligations of her contract in accordance with the laws of that state. This conclusion requires us to reverse the order of the court below opening the judgment, and to restore it to the records.

The order is reversed and set aside accordingly.

MOVABLES.

CRAPO v. KELLY, 16 WALL. 610, (1872).

MR. JUSTICE HUNT delivered the opinion of the court.

Omitting all superfluous circumstances, the facts necessary to present the question on the merits are these: On the 23d of February, 1861, the insolvent court of Massachusetts appointed Crapo and others assignees in insolvency of Gibbs & Jenny, and the judge of that court executed and delivered to them an assignment of all the personal property of Gibbs & Jenny. At this date Gibbs & Jenny were the owners of the ship Arctic, an American vessel registered at the port of Fairhaven, in the district of New Bedford, in the State of Massachusetts, which vessel was then on the high seas, to wit, in the Pacific Ocean. On the 30th day of the following April this vessel arrived in the port of New York, and was at once seized as the property of Gibbs & Jenny, by an attachment issued at the suit of one Robinson, a creditor of Gibbs & Jenny, residing in New York. On the next day but one after the arrival of the vessel Crapo came to New York and took possession of her, subject to the possession of Kelly, the sheriff. Crapo represents the title under the Massachusetts assignment, which then, and at all times since, he has sought to enforce. Kelly claims under the New York attachment.

The question is, which proceeding gave the better title.

Certain propositions relating to the question are not disputed.

1. If the assignment under which Crapo claims had been the personal act of Gibbs & Jenny, it would have passed the title to the vessel wherever she might have been at the time of its execution.

2. If the vessel at the time of the execution of the assignment had been within the territorial limits of Massachusetts, the assignment, although not the personal act of Gibbs & Jenny, would have divested their title and that of all persons claiming under them, provided diligence has been used to reduce the vessel to possession.

3. If the vessel had been in the port of New York at the time of the execution of the insolvent assignment (there being no personal assignment), and had subsequently been seized there under attachment proceedings by a New York creditor, such attachment proceeding would have held the vessel as against the prior insolvent assignment.

The first of these propositions results from the fact that personal property, wherever it may be, is under the personal control of its owner, and the title passes by his actual transfer. The second is based upon the idea that the property being actually present and under the control of the law, passes by act of the law. The third proposition assumes that a transfer by legal proceeding possesses less solemnity than one made by the owner himself; that each nation is entitled to protect its own citizens, and that the remedy by law taken by its citizens having the actual possession of the *corpus*, ought to prevail over a title by law from another State, which is not accompanied by such possession. This principle authorizes the Massachusetts assignee to hold the property when in Massachusetts, and the New York creditor to seize it when it is in New York, under the circumstances stated.

The present case is deficient in each of the elements necessary to bring the vessel within the range of the foregoing principles. She was not transferred by the personal act of the owner She was not literally within the territory of Massachusetts when the insolvent assignment took effect; and, thirdly, she was not in the port of New York.

The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts. If she was, the insolvent title will prevail.

It is not perceived that this vessel can be said to be upon United States territory, or within United States jurisdiction, or subject to the laws of the United States regulating the transfer of property, if such laws there may be. Except for the purposes and to the extent to which these attributes have been transferred to the United States, the State of Massachusetts possesses all the rights and powers of a sovereign State. By her own consent, as found in article 1 of the Constitution of the United States, she has abandoned her right to wage war, to coin money, to make treaties, and to do certain other acts therein mentioned. None of the subjects there mentioned affect the question before us. The third article of that instrument extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." This gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas. To bring a transaction within that jurisdiction, it must be not simply a transaction which occurred at sea, as the making of a contract, but one in which the question itself is of a maritime nature, or arises out of a maritime affair, or it must be a tort or crime committed on the high seas. Over such cases the United States courts have jurisdiction; that is, they are authorized to hear and determine them. No rule of property is thereby established This remains as it would have been had no such authority been given to the United States court.

To Congress is also given power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." It will scarcely be claimed that the title to property could be affected by this provision. Nor does the circumstance that the Arctic sailed under the flag of the United States and was entitled to the protection of that government against insult or injury from the citizens or ships of other nations, touch the present point. None of these instances are like that of the passage of a bankrupt law by the United States, which acts directly upon the property of all the citizens of all the States, wherever it may be. Had the claim of either party to this vessel been based upon a proceeding under that statute, the title would have been complete, if the property had been within the territory or jurisdiction of any of the States of the Union.

It is not perceived, therefore, that the relation of Massachusetts to the Union has any effect upon the title to this vessel. It stands as if that State were an independent sovereign State, unconnected with the other States of the Union. The question is the same as if this assignment had been made in London by a British insolvent court, adjudicating upon the affairs of a British subject.

We are of the opinion, for the purpose we are considering, that the ship Arctic was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that State passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that State when the assignment was executed.

The rule is thus laid down by Mr. Wheaton in his treatise on International Law: "Both the public and private vessels of every nation on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the state to which they belong. Vattel says that the domain of a nation extends to all its just possessions, and by its possessions we are not to understand its territory only, but all the rights it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea." As an illustration of the proposition that the ship is a portion of the territory of the State, the author proceeds: "Every State has an incontestable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any state may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects."

Chancellor Kent, in his Commentaries, says: "The high seas are free and open to all the world, and the laws of every state or nation have there a full and perfect operation upon the persons and property of the citizens or subjects of such a state or nation." "No nation has any right or jurisdiction at sea, except it be over the persons of its subjects, in its own public and private vessels; and so far territorial jurisdiction may be conceded as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs."

Wharton says: "A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries." "By this (he says) may be explained several cases quoted as establishing the *lex domicilii,* though they are only sustainable on the ground that the ship at sea is part of the territory whose flag she bears. . . . In respect to principle, ships at sea and the property in them, must be viewed as part of the country to which they belong."

The modern German law is to the same point. Bluntschil, in his *Moderne Volkerrect,* says: "Ships are to be regarded as floating sections of the land to which they nationally belong, and whose flag they are entitled to carry."

Bischof, in his *Grundriss des positiven internationalen Seerechts,* says: "Every state is free on the seas, so that its ships are to be regarded as floating sections of its country, *territoria clausa; la continuation ou la prorogation du territoire,* and those on board such ships in foreign waters are under their laws and protection. This even applies to children born to subjects on such ships."

Wildman, in his treatise on International Law, says: "Provinces and colonies, however distant, form a part of the territory of the parent state. So of the ships on the high seas. The rights of sovereignty extend to all persons and things not privileged, that are within the territory."

The adjudicated cases in this country are to the same effect. In *Plestoro* v. *Abraham,* it was held that where a British subject, being indebted, left England, and while on his voyage to this country and before he arrived here, he was, under the laws of Great Britain, declared a bankrupt, and provisional assignees were appointed, it was held that the assignment to such assignees divested the title of the bankrupt to the personal property brought with him to this country. In giving his opinion upon the motion to dissolve the injunction, Chancellor Walworth said: "In the case of *Holmes* v. *Remsen,* Chancellor Kent decided that an assignment by the commissioners of bankruptcy in England, operated as a legal transfer of the personal property and choses in action of the bankrupt in this country. Even as against a subsequent attachment taken out here by an American creditor, under the act against absconding and absent debtors. It is doubtful whether that decision, to its full extent, can be sustained. It was strongly opposed and ably questioned by Platt, in a case between the same parties, which subsequently came before the Supreme Court. It also stands in opposition to the opinions of the State courts in Connecticut, Massachusetts, Pennsylvania, Maryland, and in both of the Carolinas, * * * and to the decision of the Supreme Court of the United States, in *Harrison* v. *Sterry,* and in *Ogden* v. *Saunders.* But the case before me (he proceeds) steers clear of all these decisions. In the cases cited the contest was between foreign assignees and domestic creditors, claiming under the laws of the country where the property was situated and where the suits were brought. The question in these cases was, whether the personal property was to be considered as having locality for the purpose of giving a remedy to creditors residing in countries where the property was in fact situated at the time of the foreign assignment. In this case the controversy is between the bankrupt and his assignees and creditors, all residing in the country under whose laws the assignment was made. Even the property itself, at the time of the assignment, was constructively within the jurisdiction of that country, being on the high seas in the actual possession of a British subject. Under such circumstances the assignment had the effect to change the property and divest the title as effectually as if the same had been sold in England under an execution against him, or he had voluntarily conveyed the same to the assignee for the benefit of his creditors."

The case was carried to the Court of Errors of the State of New York, that body being composed of the chancellor, the judges of the Supreme Court, the lieutenant-governor, and the members of the senate. The record did not show distinctly that the vessel which brought the goods was a British ship, and on this point the chancellor's order was reversed. Marcy, justice, and Throop, lieutenant-governor, eminent men and able judges, held that the assignment in Great Britain divested the title of the bankrupt to personal property in this country, and that his property in a vessel on the high seas was likewise transferred. Maynard, Oliver and Stebbins held that, as to the personal property of the bankrupt *in this* country, the assignment did not effect a transfer of the same, even as between the asignee and the bankrupt. Maynard and Stebbins held that to produce the transfer, under such circumstances, of the property of a British bankrupt, which was on the high seas at the time of the assignment, it must distinctly appear that the vessel was a British vessel, and thus the property was within British jurisdiction. It is fairly to be inferred that if it had appeared that the vessel was a British vessel the Chancellor's order would have been sustained. Thus Mr. Ogden, who argued for the reversal of the order, said: "Had the goods been on board a British vessel it would have been so averred. In the absence of such averment the fair conclusion is that the vessel in which they were embarked was American; and if so, the goods were as much within our jurisdiction as if landed in a storehouse at New York." Senator Maynard, in his opinion, repeats this statement. He says: "The presumption was as fair that it was on board of an American ship as that it was on a British ship; and if so, it was, at the date of the assignment, within the jurisdiction of this country." Stebbins, senator, says: "I hold, therefore, that if this property was laden on board an American vessel, and on the high seas at the time of the assignment, it was within the jurisdiction of the United States, and could no more pass by that assignment than if lodged in the custom-house in New York; and if laden on board a British vessel that fact should have been averred by the asignee as essential to his title." The chancellor's order was reversed, and apparently upon this ground, that it did not actually appear that the ship on which the goods were laden was a British ship. The principle of the decision was in accordance with the principle announced by the chancellor, as already quoted, to wit, that the presence of the goods in a British ship on the high seas, continued them within British jurisdiction. The limited application given to this decision in *Johnson* v. *Hunt*, is scarcely sustained by the facts. None of the other cases cited are cases of goods on the ship of the state or nation of the insolvent whose goods are the subject of the assignment. They are cases where the property was confessedly within another jurisdiction and hence the conflict.

Judge Story says, upon this case: "It is difficult to perceive how the doctrine of the chancellor, as to the operation of the British bankrupt laws upon the British subjects and their property *in transitu* can be answered. The transfer must be admitted to be operative to divest the bankrupt's title to the extent of an estoppel as to his own personal claim in opposition to it, for the law of America, be it what it may, had not then operated upon it. It was not locally within our jurisdiction. No one could doubt the right of the assignee to personal property locally in England at the time of the assignment. In what respect does such a case differ from a case where it has not passed into another jurisdiction? Is there any substantial difference between its being on board a British vessel and its being on board of an American vessel on the high seas?" No claim can be made that this vessel was within the jurisdiction of New York when the assignment was executed.

If the title passed to the insolvent assignees, it passed *eo instanti* the assignment was executed. It took effect then or never. The return of the vessel afterwards to America, her arrival in the port of New York, her seizure and sale there did not operate to divest a title already complete.

Again, the owners of this vessel and the assignees in insolvency were citizens of Massachusetts, and subject to her laws. It is not doubted that a sale of property between them of property on board of this vessel, or of the vessel itself, would be regulated by the laws of Massachusetts. It is not doubted that the vessel was taxable in Massachusetts only, or that if Gibbs or Jenny had been on board of the vessel, and had died before the vessel reached New York, his personal property on or in her would have passed under the laws of Massachusetts.

If this vessel had never returned to the American shores but had gone to the bottom in the Pacific seas, after the assignment was complete, whose vessel would she have been at the time of such loss? There can be but one answer. The Massachusetts statute declares that this assignment vested in Crapo and his associates all the title and interest the insolvent had in this vessel. In other words it vested in them the absolute ownership. There was not then, or for weeks afterwards, any possible question of their title. The insurance-money upon the ship would have been their property, and they would have been bound to collect it and distribute it among the creditors.

Personal property which has an established *situs* in another State, is no doubt governed by the *lex loci sitae rei,* so far that it will be governed in its distribution by the laws of the place where found, rather than the law of the domicile. This rule only applies where such property has acquired an established *situs.* Until that occurs there can be no conflict of jurisdiction.

It is said, however, that the fact that the property on board a vessel at sea and the vessel itself, contracts respecting them and the distribution of the assets of the intestate, are regulated by the laws of Massachusetts, arises solely from the circumstance that the owner is a resident of that State; that jurisdiction of the parties it is, that gives the jurisdiction of these subjects. The authorities from Kent, Story, and Wheaton, and the continental authorities, the civil law before cited, as well as the decisions in *Plestoro* v. *Abrahams,* make the ship itself, under such circumstances, a part of the territory of the State to which its owner belongs. If he resides in Boston his property in the remotest county in the State is under the protection of its laws, as being upon and within its territory. So his property on his ship, for the purpose we are considering, is legally and constructively within its territory. In each case it is true that the existence of an owner is necessary to call forth the exercise of the law and the duty and power of the State. In this sense, it is true, that the residence of the owner produces the result. It is produced, however, not only by the existence and residence of the owner, but by an extended State territory upon which his property remains, and where it is subject to State laws and entitled to the protection of the same laws.

Grotius holds that sovereignty may be acquired over a portion of the sea, *ratione personarum.* Rutherford and others hold this to be an error, and that no nation has jurisdiction over the ocean itself. All agree that jurisdiction over the public and private vessels of a nation at sea, remains to the nation, and it is expressed in the language already quoted.

In the celebrated Trent Case, occurring in 1862, Messrs. Mason and Slidell were removed from a British private vessel by Commodore Wilkes of the San Jacinto, a public vessel of the United States. Great Britain insisted that the rights of a neutral vessel not only had been violated, for which she demanded apology, but she insisted that these persons should be replaced and returned on board a British ship. This was done, and they were actually placed on board a British vessel in or near the harbor of Boston. They were not British subjects, and their return could only have been demanded for the reason that they had been torn from British soil, and the sanctity of British soil as represented by a British ship had been violated. Citizenship or residence had no influence upon the question.

This vessel, the Arctic, was upon the high seas at the time of the assignment. The status at that time decides the question of jurisdiction. The State of New York had no jurisdiction over her until long afterwards. No conflict can, therefore, arise between the laws of New York and of Massachusetts. The United

States had no jurisdiction over her for the purpose we are considering. We hold that she was subject to the disposition made by the laws of Massachusetts, and that for the purpose and to the extent that title passed to the assignees, the vessel remained a portion of the territory of that State.

JUDGMENT REVERSED, and the case remanded FOR FURTHER PROCEEDINGS.

BARNETT v. KINNEY, 147 U. S. 476, (1893).

THIS was an action of replevin commenced in the District Court of Alturas County, Territory of Idaho, on December 12, 1887, by Josiah Barnett against P. H. Kinney to recover the possession of certain goods and chattels mentioned in the complaint and for damages and costs. The case was submitted to the court for trial, a jury having been expressly waived, upon an agreed statement of facts, and the court made its findings of fact as follows: That on November 23, 1887, M. H. Lipman was a citizen of the United States and of the territory of Utah, residing and doing business at Salt Lake City, and was possessed and the owner of real and personal property in Utah, and of certain personal property at Hailey, in Alturas County, Idaho; and that he was indebted to divers persons, (none of whom were then, or at the time of trial, citizens, residents and inhabitants of Idaho,) and was insolvent, and on that day duly made, executed and delivered to Barnett, as his assignee, a deed of assignment in writing, which was accepted by Barnett, who assumed the execution thereof; that by the assignment, Lipman sold, transferred, assigned and delivered to Barnett all his property, real and personal, wherever found, in trust, to take possession and convert the same into cash, and pay the necessary expenses, and then his creditors, according to certain classes named in the assignment, preferences being made thereby in favor of certain creditors, as against others, all being designated by classes; that on November 25, 1887, Barnett, as assignee, took actual possession of the personal property situated in Idaho, and on November 26, and before the property was taken by Kinney, filed the assignment for record in the proper office in

Alturas County; and that Kinney had actual knowledge and notice in the premises. It was further found that the assignment "was and is valid by the laws of the Territory of Utah;" that Lipman was indebted to the St. Paul Knitting Works, a corporation organized and existing under the laws of the State of Minnesota, the liability having been incurred by him as a citizen, resident and inhabitant of Utah, and in the transaction of his business there; that on November 26, 1887, and while Barnett was in actual possession, Kinney, who was sheriff of Alturas County, under a writ of attachment in favor of that corporation and against Lipman, took possession of the property; and that thereupon this action of replevin was commenced and the possession of the property delivered to Barnett, who had sold the same and retained the proceeds subject to the final disposition of the action. It was further found that prior to the taking of the property from Barnett by Kinney under the writ of attachment and after the assignment had been recorded, Kinney, as sheriff, had taken it from Barnett's possession under a writ of attachment issued at the suit of a firm located in Nebraska against Lipman, and it had been retaken from Kinney in an action of claim and delivery brought by Barnett against him, which action was still pending. It was also found that the goods had been shipped from Lipman's store in Utah in September, 1887, to Alturas County, and that Lipman from September, 1887, up to the time of making the assignment, had been doing business in Idaho in the running of a branch store at Hailey, in Alturas County; and that at the time of bringing this action defendant was wrongfully detaining the property from the possession of plaintiff.

The court found as conclusions of law that the assignment, a copy of which was annexed to the finding of facts, was a good and valid instrument, and conveyed title to the property in question; and that the plaintiff at the time of bringing the action and the trial was entitled to the possession of the property, and to judgment therefor, and for nominal damages and costs. Judgment having been entered, an appeal was prosecuted to the Supreme Court of the Territory, by which it was reversed, and the cause remanded to the District Court with instructions to enter judgment for the defendant. The record shows that the case had been tried in the District Court before the then Chief Justice of the Territory, and that a change had taken place in that office when the hearing was had on appeal. Of the three members composing the Supreme Court, one was for reversal and another for affirmance, while the Chief Justice had been of counsel between the same parties in a case in the same District Court, but "with a different attaching creditor," and he stated that he had not participated in the discussion of the case, but, his associates having reached opposite conclusions, the disagreeable duty rested upon him "of breaking the dead-lock," which he did by concurring in the opinion for reversal. The majority opinion is to be found in 23 Pac. Rep. 922, and the dissent in 24 Pac. Rep. 624. The case was brought by appeal to this court.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The Supreme Court of the Territory held that a non-resident could not make an assignment, with preferences, of personal property situated in Idaho, that would be valid as against a non-resident attaching creditor, the latter being entitled to the same rights as a citizen of Idaho; that the recognition by one State of the laws of another State governing the transfer of property rested on the principle of comity, which always yielded when the policy of the State where the property was located had prescribed a different rule of transfer from that of the domicil of the owner; that this assignment was contrary to the statutes and the settled policy of Idaho, in that it provided for preferences; that the fact that the assignee had taken and was in possession of the property could not affect the result; and that the distinction between a voluntary and an involuntary assignment was entitled to no consideration.

Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicil of the owner, will be held to be valid in the courts of another country, where the property is situated and a different local rule prevails.

We had occasion to consider this subject somewhat in *Cole* v. *Cunningham*, 133 U. S. 107, 129, and it was there said: "Great contrariety of state decision exists upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the states, the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicil of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed. This is a reason which applies to citizens of the actual *situs* of the property when that is elsewhere than at the domicil of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

We have here a voluntary transfer of his property by a citizen of Utah for the payment of his debts, with preferences, which transfer was valid in Utah, where made, and was consummated by the delivery of the property in Idaho, where it was situated, and then taken on an attachment in favor of a creditor not a resident or citizen of Idaho. Was there anything in the statutes or established policy of Idaho invalidating such transfer?

Title XII of Part Second of the Revised Statutes of the Territory of Idaho, entitled "Of proceedings in insolvency," (Rev. Stats. Idaho, §§ 5875 to 5932,) provided that "no assignment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors;" that creditors should share *pro rata*, "without priority or preference whatever;" for the discharge of the insolvent debtor upon compliance with the provisions of the title, by application for such discharge by petition to the District Court of the county in which he had resided for six months next preceding, with schedule and inventory annexed, giving a true statement of debts and liabilities and a description of all the insolvent's estate, including his homestead, if any, and all property exempt by law from execution. The act applied to corporations and partnerships, and declared that if the partners resided in different counties, that court in which the petition was first filed should retain jurisdiction over the case. Nothing is clearer from its various provisions than that the statute had reference only to domestic insolvents. As pointed out by Judge Berry in his dissenting opinion, the first section of the fifty-eight upon this subject, in providing that "every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities," demonstrates this. The legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho, belonging to citizens of other States or Territories, could not be applied to the payment of their debts unless they acquired a six months' residence in some county of Idaho, and went through its insolvency court.

The instrument in controversy did not purport to be executed under any statute, but was an ordinary common law assignment with preferences, and as such was not, in itself illegal. *Jewell* v. *Knight,* 123 U. S. 426, 434. And it was found as a fact that it was valid under the laws of Utah. While the statute of Idaho prescribed *pro rata* distribution without preference, in assignments under the statute, it did not otherwise deal with the disposition of his property by a debtor nor prohibit preferences between non-resident debtors and creditors through an assignment valid by the laws of the debtor's domicil. No just rule required the courts of Idaho, at the instance of a citizen of another state, to adjudge a transfer, valid at common law and by the law of the place where it was made, to be invalid, because preferring creditors elsewhere, and, therefore, in contravention of the Idaho statute and the public policy therein indicated in respect of its own citizens, proceeding thereunder. The law of the *situs* was not incompatible with the law of the domicil.

In *Halstead* v. *Straus,* 32 Fed. Rep. 279, 280, which was an action in New Jersey involving an attachment there by a New York creditor as against the voluntary assignee of a New York firm, the property in dispute being an indebtedness of one Straus, a resident of New Jersey, to the firm, Mr. Justice Bradley remarked: "It is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void. But this law applies only to New Jersey assignments, and not to those made in other States, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a non-resident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by non-resident debtors. *Bentley* v. *Whittemore,* 4 C. E. Green, (19 N. J. Eq.) 462; *Moore* v. *Bonnell,* 2 Vroom (31 N. J. Law,) 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If Deering, Milliken & Co. were a New Jersey firm they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicil. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case, would be unreasonable and uncalled for."

In *May* v. *First National Bank,* 122 Illinois, 551, 556, the Supreme Court of Illinois held that the provision in the statute of that State prohibiting all preferences in assignments by debtors applied only to those made in the State, and not to those made in other States; that the statute concerned only domestic assignments and domestic creditors; and the court, in reference to the contention that, if not against the terms, the assignment was against the policy of the statute, said: "An assignment giving preferences, though made without the State, might, as against creditors residing in this State, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors—that it was the policy of the law that there should be an equal distribution in respect to them. But as the statute has no application to assignments made without the State, we cannot see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect to foreign creditors, and why non-residents are not left free to execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors."

In *Frank* v. *Bobbitt,* 155 Mass. 112, a voluntary assignment made in North Carolina and valid there, was held valid and enforced in Massachusetts as against a subsequent attaching creditor of the assignors, resident in still another State, and not a party to the assignment. The Supreme Judicial Court observed that the assignment was a voluntary and not a statutory one; that the attaching creditors were not resident in Massachusetts; that at common law in that State an assignment for the benefit of creditors which created preferences was not void for that reason; and that there was no statute which rendered invalid such an assignment when made by parties living in another State, and affecting property in Massachusetts, citing *Train* v. *Kendall,* 137 Mass. 366. Referring to the general rule that a contract, valid by the law of the place where made, would be regarded as valid elsewhere, and stating that "it is not necessary to inquire whether this rule rests on the comity which prevails between different states and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses," the court said that the only qualification annexed to voluntary assignments made by debtors living in another State had been "that this court would not sustain them if to do so would be prejudicial to the interests of our own citizens or opposed to public policy." And added: "As to the claim of the plaintiffs that they should stand as well as if they were citizens of this State, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens nor opposed to public policy, no cause appears for pronouncing it invalid." And see, among numerous cases to the same effect, *Butler* v. *Wendell,* 57 Michigan, 62; *Receiver* v. *First National Bank,* 7 Stewart, (34 N. J. Eq. 450); *Egbert* v. *Baker,* 58 Connecticut, 319; *Chafee* v. *Fourth National Bank of New York,* 71 Maine, 514; *Ockerman* v. *Cross,* 54 N. Y. 29; *Weider* v. *Maddox,* 66 Texas, 372; *Thurston* v. *Rosenfield,* 42 Missouri, 474.

We do not regard our decision in *Green* v. *Van Buskirk,* 5 Wall. 307; 7 Wall. 139, as to the contrary. That case was fully considered in *Cole v. Cunningham, supra,* and need not be reëxamined. The controversy was between two creditors of the owner of personalty in Illinois, one of them having obtained judgment in a suit in which the property was attached and the other claiming under a chattel mortgage. By the Illinois statute such a mortgage was void as against third persons, unless acknowledged and recorded as provided, or unless the property was delivered to and remained with the mortgagee, and the mortgage in that case was not acknowledged and recorded, nor had possession been taken. All parties were citizens of New York, but that fact was not considered sufficient to overcome the distinctively politic and coercive law of Illinois.

In our judgment, the Idaho statute was inapplicable and the assignment was in contravention of no settled policy of that Territory. It was valid at common law, and valid in Utah, and the assignee having taken possession before the attachment issued, the District Court was right in the conclusions of law at which it arrived.

The judgment is reversed and the cause remanded to the Supreme Court of the State of Idaho for further proceedings not inconsistent with this opinion.

Judgment reversed.

ATTACHMENT AND SITUS OF A DEBT.

NATIONAL FIRE INS. CO. v. CHAMBERS, 53 N. J. EQ. 468 (1895).

On interpleader.

The contest in this case is between the defendants Harding, Whitman & Company on the one side and Mr. J. J. Crandall on the other. Both parties claim under the defendant, Frank Chambers, an admitted creditor of the complainant.

Harding, Whitman & Company claim under an attachment issued out of the court of common pleas No. 4, of the city of Philadelphia, against Chambers, and Mr. Crandall claims under an assignment from him subsequent in date to the attachment of Harding, Whitman & Company. The question is whether Harding, Whitman & Company's attachment gave them a lien upon the debt due from complainant to Chambers; or, as otherwise expressed, effected an involuntary assignment of it from Chambers to them.

The facts which clearly appear are as follows:

Chambers was and is a resident of New Jersey, engaged in manufacturing, with a plant at Camden, which was insured against loss by fire by the complainant and other insurance companies. A fire occurred in it on the 20th of June, 1893. On or shortly before the 29th of June the representatives of the different underwriters met and adjusted the amount of the loss, and also apportioned it as between themselves, with the result that the amount allotted to the complainant was $591.68. On June 29th the defendants, William P. Datz and Alois D. Datz, trading as W. P. Datz & Brother, sued out of the court of common pleas No. 2, of the county of Philadelphia, State of Pennsylvania, a writ of foreign attachment against Chambers, returnable on the third Monday of September, 1893, founded on a claim of

$285.91 against Chambers. The instructions endorsed on that writ commanded the sheriff to attach "all and singular the goods and chattels, lands and tenements, rights and credits of the defendant, Frank Chambers, in whose hands soever they may be, and summon them as garnishees, and especially all sums due by the National Fire Insurance Company of Hartford, Connecticut, and Rochester German Insurance Company, to said defendant, and summon them as garnishees."

By virtue of that writ the sheriff of the county of Philadelphia, by his deputy, at a quarter after three o'clock, June 29th, made the usual declaration in attachment in the presence of William F. Bradway, named in the writ as the agent of the complainant in Pennsylvania, designated as such by the complainant, at his office in the city of Philadelphia.

The Complainant duly appeared to this suit, and then, according to the practice in the Pennsylvania courts, the plaintiffs, Datz & Brother, served interrogatories upon it, wherein, among other questions, they asked whether at the time the writ was served upon complainant's agent there was anything due from it to Frank Chambers, on a policy of insurance. To that interrogatory the complainant answered that the sum of $591.68 was due from it to said Frank Chambers, which it was willing and ready to pay to the person entitled to receive the same.

On the 3d of August, 1893, the defendants Harding, Whitman & Company, sued out of the court of common pleas No. 4, of the city of Philadelphia, a like writ of attachment against Frank Chambers, returnable on the third Monday of September, 1893, which the sheriff served in precisely the same manner as he had served the previous one of Datz & Brother. To that writ the complainant herein duly entered an appearance.

In each of the attachment suits the respective plaintiffs filed statements of their claims, with an affidavit of one of the firm that the amount claimed was due, and in each judgment was entered against the defendant Chambers—in the case of Datz & Brother for the sum of $229.92, March 26th, 1894, and in the case of Harding, Whitman & Company for $5,549.93. April 6th, 1894.

On the 30th of January, 1894, seven months after the adjustment of the loss, the defendant Chambers commenced an action in contract against the complainant, in the Camden county circuit court, founded on the amount found to be due. as above stated, upon the policy of insurance issued by complainant to him, under which the loss occurred, and served process upon complainant through its agent in this state. Whereupon on the 19th of February, 1894, the complainant filed its bill of interpleader against Datz & Brother, Harding, Whitman & Company, and Chambers, and paid into court the sum of $591.68, and obtained from this court an injunction against further prosecution of the garnishment proceedings by Datz & Brother and Harding, Whitman & Company against it in the courts of Philadelphia, and the action at law by Chambers in the Camden circuit. Motion was made to dismiss this bill before Vice-Chancellor Green, and was refused by him on the 20th of March, 1894. The usual order discharging the complainant, and that the defendants interplead, was made on the 23d of July, 1894.

Datz & Brother did not submit to the jurisdiction of this court, and on the 3d of April, 1894, a rule to show cause was granted in their suit in common pleas No. 2 why judgment should not be entered against the insurance company, complainant herein, as garnishee. That rule was resisted, and the complainant was permitted to file supplemental answers to the interrogatories which had been previously administered to it, according to the practice in the Pennsylvania courts, and in those, by way of plea *puis darrein continuance,* it set up the suit brought by Chambers against it in the Camden circuit, and that, being advised that it would not be able to set up as a defence at law to that action the attachment proceedings in Pennsylvania, it had filed its bill of interpleader in this court, and had obtained an injunction against Chambers and Datz & Brother. It further set up as an affirmative defence to the proceedings in garnishment that the amount due to Chambers under its policy was not due or payable in the State of Pennsylvania, but at the main office of the company, in the city of Hartford, Connecticut; that the policy of insurance was not issued in the State of Pennsylvania, nor had the amount due thereunder, either at the time of the writ of attachment or prior or subsequent thereto, been in the possession of the agent of the company in the State of Pennsylvania, or in the hands of any other person in the State of Pennsylvania.

The court of common pleas No. 2, after argument, in a considered judgment reviewing the authorities, overruled this defence, holding that this court had no power to enjoin Datz & Brother, and that the complainant was subject to garnishment in Pennsylvania through its duly authorized agent, and entered judgment against complainant for $299.92, the amount previously recovered against Chambers, with $16.12 costs. This judgment has been paid by the complainant.

Harding, Whitman & Company did not follow up their judgment in attachment against Chambers by garnishee proceedings against the complainant herein, but obeyed the injunction of this court.

Mr. John J. Crandall presented his petition to this court on the 20th of April, 1894, setting up that on the 19th of January, a few days before the commencement of the suit by Chambers against complainant in the Camden circuit court, he (Chambers) assigned to him (Crandall) all the moneys to be recovered on the policy, and authorized him to proceed to recover the money by suit in Chambers' name. On the basis of that petition, an order was made admitting Mr. Crandall as a defendant herein, and on the 19th of May, 1894, he filed his answer, setting up that he was entitled to the moneys to be recovered in the suit in the Camden circuit, by virtue of the assignment to him of the 19th of January, 1894, and asserting that Harding, Whitman & Company obtained no rights, either at law or in equity, by virtue of their attachment proceedings in the State of Pennsylvania. Incorporated in this answer of Mr. Crandall was a cross-bill praying that the money might be paid to him.

The defendants Harding, Whitman & Company answered on the 19th of July, 1894, setting up their claim against Chambers and the attachment in the State of Pennsylvania; also, a judgment recovered in this state against Chambers, on the same claim and for the same amount.

Mr. Thomas B. Harned, for Harding, Whitman & Company.

Mr. John J. Crandall, for himself.

Pitney, V. C.

The only question here involved is this, Did Harding, Whitman & Company, by their proceeding in attachment in the Philadelphia common pleas, obtain a lien upon the debt due from the complainant to Chambers, now represented by the fund in court in this cause? or, as it may be otherwise expressed, Did the proceeding effect an involuntary assignment of the debt from Chambers to Harding, Whitman & Company? If such was the result of their proceeding, it seems to me to follow conclusively that they must prevail in the present contest upon the familiar principle that he who is first in time is best in right. ?

A faint attempt was made to show, by proofs, that Mr. Crandall's interest in the claim antedated the attachment of Harding, Whitman & Company. I think this attempt failed. He put himself, both in his petition and in his answer, wholly upon his assignment of January, 1894, and at the argument he relied wholly upon the ground, as I interpret his argument, that the Pennsylvania court had no jurisdiction, no power to seize this debt, and that the proceedings for that purpose should not be recognized as valid by this court.

The proceedings in the *Datz Case* show clearly enough that the Pennsylvania courts, if properly sued by Harding, Whitman & Company, will proceed to render judgment against the complainant, as garnishee of Chambers, in favor of Harding, Whitman & Company. The only difference between the case of Harding, Whitman & Company and the *Datz Case* is that Harding, Whitman & Company are non-residents of Pennsylvania. But the Pennsylvania statute, with regard to foreign attachments, makes no distinction between domestic and foreign creditors in this behalf, and I can find no trace of any such distinction having been taken in any of the decided cases. *Franklin Fire Insurance Co.* v. *West, 8 Watts & S. 350; Girard Fire Insurance Co.* v. *Field, 45 Pa. St. 129; Appeal of Jaffray & Co., 101 Pa. St. 583; Chase* v. *Ninth National Bank of New York, 56 Pa St. 355.* Oral proof was given in this case, by a member of the Philadelphia bar, that there was no such distinction; that non-resident creditors had the same rights to sue out writs of attachment against non-resident debtors as have resident creditors of that state. And such is the rule in our own and in most, if not all, the other states of the union. I am, therefore, forced to the conclusion that if Harding, Whitman & Company had not submitted themselves to the jurisdiction of this court, but had proceeded in their attachment suit with the ordinary proceedings against complainant as garnishee, they would have recovered judgment against complainant which would have bound it in all jurisdictions.

It follows that it is thoroughly established that, according to the system of jurisprudence administered by the courts of Pennsylvania, Harding, Whitman & Company did acquire a lien upon this debt due from complainant to Chambers by their proceedings in the Pennsylvania courts.

Is there anything in that system, as manifested in this case, which is contrary to international law, or to the fundamental principles of natural justice recognized by all civilized nations?

First. Does it result in rendering judgment against a party without having acquired jurisdiction of his person by notice served upon him within the territorial jurisdiction? The language of the Pennsylvania act is "that any legal process affecting the insurance company, served on the agent specified by the company to receive service of process for said company, shall have the same effect as if served personally on the company within this state."

Clearly, the meaning of the language "served personally on the company within this state," is served personally on a company domiciled within this state. Such has been the construction put upon it by the courts of Pennsylvania. And that the term "process shall be construed to mean and include any and every writ, rule, order, notice or decree, including any process of execution that may issue in or upon any action, suit or legal proceedings to which said company may be a party by themselves or jointly with others, whether the same shall arise upon a policy of insurance or otherwise, * * * and every such service shall have the same force and effect, to all intents and purposes, as personal service on the company in the county where said process shall issue."

It is difficult to conceive language more comprehensive than this. It clearly includes process of garnishment. And the consent filed with the insurance commissioner, and the appointment of Bradway as its agent for that purpose in Philadelphia, was a voluntary consent to subject itself to that jurisdiction. Clearly, the complainant cannot object to the validity of the law.

Second. Can its creditors object? It is difficult to see how they can be injured by it. Take the present case. If Mr. Chambers had desired to apply this debt due him from complainant to a particular purpose—for example, the payment in whole or in part of a particular creditor of his—he could have done so by prompt action for that purpose, or he could, by a proper assignment, have divided it equally among all his creditors, and his *bona fide* assignee, whether he held for himself individually or in trust for the several creditors of Chambers, if, in fact, prior in time, would have been first in right. But Chambers took no such action for over six months, with the result that two of his creditors did take prompt action, through the courts of Pennsylvania, to forcibly apply the amount due Chambers from complainant to the payment of their debts against Chambers.

Now I can find no injustice in such proceeding. It is the ordinary process of attachment and garnishment in use in all jurisdictions deriving their laws from England. And it is difficult to perceive what difference it makes to Chambers, or his subsequent assignee, whether it be instituted in Pennsylvania as the conventional domicile of the garnishee, or in Connecticut, its actual domicile. Wherever instituted, the result is the same, viz., to forcibly apply a debt due from complainant to Chambers to the payment, *pro tanto,* of a debt due from Chambers to a third party who is the actor in the suit. The possible hardship and injustice to Chambers in such exercise of power arises out of the proceeding against him, as an absent debtor, by publication and without personal notice served within the territorial jurisdiction. But this is a source of hardship and injustice common to all proceedings by foreign attachment wherever taken. It was no greater hardship or injustice to him to compel him to go to Pennsylvania than to Connecticut to defend unjust or unfounded claims, if any, set up against him. No question can possibly be raised as to the right of the legislature of Connecticut, complainant's domicile of origin, to authorize its court to entertain such jurisdiction.

In every case the means of notice to the defendant in attachment of such claims is the same, viz., either by inquiry—in this case—of his debtor (the garnishee) why he does not pay his debt to him (Chambers); or, if tangible chattels be seized, then by visual observation of such seizure. This mode of notice, of course, is in addition to the usual statutory notice by publication in use by all jurisdictions.

But it is said that the subject-matter of seizure, the *res*, must be within the jurisdiction of the court where the attachment proceeding is taken, otherwise the assumption of jurisdiction over it is unwarranted by general international law founded upon fundamental principles of justice; and that, in the case of a debt attached, the debt is the *res*, and cannot be said to be in a jurisdiction where neither the debtor nor creditor is domiciled; and this is the precise point of the argument made by Mr. Crandall. He says that the *res* attempted to be dealt with by the Pennsylvania court was never within its jurisdiction, because it was owing by a corporation domiciled in Connecticut to a creditor domiciled in New Jersey. Let us see what substance there is in this point.

The precise *res* here attached was a chose in action—the right of Chambers to sue the complainant and recover judgment against it, and seize its property. Now, by the statute of Pennsylvania, it seems to me that he had the right to cross into Philadelphia and bring an action against complainant in the Pennsylvania courts upon his policy, not as an artificial person casually and temporarily present in the state, but as being provisionally domiciled there for the purpose of being sued. That statute is wide and sweeping in its provisions, and does not limit the right of suit to residents of Pennsylvania upon contracts made in that state, as did the statute in question in *Lafayette* v. *French, 18 How. 404,* or that in question in *Meyer* v. *Insurance Co., 40 Md. 575.* If, then, the courts of Pennsylvania were open, as the course of decisions shows them to be, to Mr. Chambers to sue the complainant on his policy in the State of Pennsylvania, why was not the right so to do attachable? If the debt had been due to Mr. Chambers from a natural person domiciled in Connecticut, and that natural person had been present in Pennsylvania, not casually and temporarily, but with a permanent place of business there, and had been served with the attachment at the suit of the present contestants against Chambers as a foreign resident, would not that individual debtor have been properly garnished in the State of Pennsylvania? It seems to me that he would, and that the right of action would, for the time being, have been within the jurisdiction of that court. Judge Waples, in his book on *Attachments* (at *p. 249*), uses this language, which seems to be in point:

"The credit is attachable when it has followed the person garnished (who is the debtor to the absent defendant) and has thus come within the jurisdiction; when it is collectible within the jurisdiction."

If, then, Mr. Chambers could have brought suit against complainant in the Philadelphia courts upon his claim and recovered judgment against it, binding in all jurisdictions, I see no reason why such right of action could not be attached in the Pennsylvania courts.

Substantially that proposition was decided by the supreme court of Massachusetts in the case of *National Bank of Commerce* v. *Huntington, Little Rock and Fort Smith Railroad Co., as trustees* (*garnishees*), *129 Mass. 444*. In that case the plaintiff sued out trustee process, presumably by foreign attachment, against the railroad company by reason of a debt it owed to the defendant Huntington, who was a debtor of the plaintiff. That company was domiciled wholly in the State of Arkansas, having been created by the laws of that state, and all its property was there situate, but it had an office for the transaction of all its ordinary financial business in the city of Boston. The opinion of the court, after showing by citation of previous cases that the laws of that state at one time were unfavorable to trustee process against corporations (see *Drake Att.* (*6th ed.*) § *478*), proceeded to say (at *p. 446*) that the law was amended "by providing that non-residents and corporations established by the laws of another state may be summoned as trustees, if they have a usual place of business in this commonwealth. *Statutes of 1870 ch. 194.*" And it was held in that case, after consideration of all the cases, that the railway company could be garnished as trustees of a debt they owed to Huntington, the defendant in the suit. This language is used (at *p. 449*): "There is no doubt that a state may prohibit foreign corporations from transacting business within its limits, or it may permit them to do so upon such proper terms and conditions as it may prescribe. It is clearly to be implied from the statute that a foreign corporation may have a usual place for the transaction of its business within this commonwealth; and it is equally clear that, in exercising such privilege, it is subject to the provisions of this statute, and is liable to be summoned as trustee."

I see no difference between the statute of Massachusetts just recited, giving in express terms the power to garnishee foreign corporations, and the construction put upon the Pennsylvania statute by the courts of that state. Each provides and holds, in effect, that a foreign corporation which is a debtor and has a place of business or agent, for the purpose of being sued, in the respective states, may be made a garnishee or trustee of a debt due from it.

The question whether or not a certain statutory provision does have the effect of giving the right of garnishment, and whether that statutory regulation has been followed in a particular proceeding, is a matter entirely for the construction of the courts of the jurisdiction. Their decision upon the subject is final, and we cannot go behind it.

The precise question now under consideration is not whether the statutes of a particular state have, in fact, properly construed, subjected foreign corporations doing business in the state to process of garnishment on account of debts due by them to non-residents, but whether such legislation is beyond the power of the state, because contrary to international law and fundamental principles of justice. On this point the weight of authority, as I think, is clearly in favor of its validity. *Fithian* v. *New York and Erie Railroad Co., 31 Pa. St. 114; Barr* v. *King, 96 Pa. St.*

485; Railroad v. *People, 31 Ohio St. 537; McAllister* v. *Penn Insurance Co., 28 Mo. 214; Brouser* v. *New England Fire Insurance Co., 21 Wis. 512; Hannibal and St. Joseph Railroad Co.* v. *Crane, 102 Ill. 249; Selma Railroad Co.* v. *Tyson, 48 Ga. 352; National Bank* v. *Burch, 80 Mich. 242; Railroad Company* v. *Thompson, 31 Kan. 180;* and see other cases cited, *8 Am.* & *Eng. Encycl L. pp.* 1131, 1132.

I have already shown, to my own satisfaction at least, that no injustice is done the creditor by such legislation. He must, in this case, be presumed to have contracted with the complainant with the knowledge, which is quite common, that the various insurance companies of this country, though chartered and having their legal domicile in some one particular state, do, in fact, do business in many states upon terms of establishing and maintaining in each of them a domicile for purposes of suits at law. His action against the complainant, commenced in the Camden circuit court by process served on its agent there, is a striking illustration of the situation of affairs in this respect.

In the leading case of *Embree & Collins* v. *Hanna, 5 Johns. 101*, the case was this: A resident of Maryland was indebted to a creditor, who was a non-resident of Maryland, and a creditor of this creditor, who was also a non-resident of Maryland, sued out an attachment from the court of Maryland, pursuant to the laws of that state, and garnished the Maryland debtor. While these proceedings were pending, the Maryland debtor (garnishee), happening to be in New York, was there arrested at the suit of his immediate creditor and pleaded the Maryland attachment proceedings in abatement, and it was held in an opinion delivered by Chief-Justice Kent, wherein he reviews all the authorities up to that time, that the plea was good.

Mr. Brown, in his treatise on *Jurisdiction* (at § *150*), lays down the rule that "all the property in debts belongs to the creditors to whom they are payable, and follows the creditor's domicile. His domicile fixes the *situs* of this species of property."

And he seems to be supported by Mr. Justice Story (*Confl. L.* § *399*) and by the other authorities cited by him.

Mr. Justice Greer, in *Caskie* v. *Webster, 2 Wall. Jr. 131*, uses this language: "A debt is a mere incorporeal right. It has no *situs,* and follows the person of the creditor."

In *Williams* v. *Ingersoll, 89 N. Y. 508,* the learned judge (Earl) says: "A debt always under general jurisprudence has its *situs* either at the domicile of the creditor or where the written obligation upon which it is due is held, and not at the *situs* of the debtor." And to the same effect is Mr. Wharton (*Confl. L.* §§ *359, 361*).

It is to be observed that the policy of insurance in this case fixes no place for the payment of any loss incurred under it. It appears on its face to have been negotiated at and issued by the Camden agency of the complainant.

And see, on the subject of the *situs* of choses in action, *McDougal* v. *Paige, 55 Vt. 187; S. C., 45 Am. Rep. 602,* where it was held, after a consideration of numerous authorities, that a debt due by a citizen of Vermont to a citizen and resident of Canada was not discharged by a certificate of discharge in bankruptcy of the Vermont debtor under the Federal Bankrupt law, for the reason that the *situs* of the debt was at the domicile of the creditor, and so beyond the jurisdiction of the federal court.

To the same effect is *Speed* v. *May, 17 Pa. St. 91.* And see the opinion of Mr. Justice Peckham, in *Guillander* v. *Howell, 35 N. Y. 657* (at *p. 661*), where the clear distinction in this respect between debts and movables, consisting of tangible property capable of seizure and levy, is pointed out, and it is held that the latter may have a *situs* independent of the domicile of the owner, while the former (debts) are incapable of such *situs* and follow the domicile of the owner, who is the creditor. And this seems to be necessarily so upon principle, for a debt is an intangible thing and has no actual *situs,* unless such be attached to the evidence of the debt, and that is usually in the actual possession, as in this case, of the creditor.

In fact, the burden of the argument of Mr. Crandall was that the debt due from the complainant to Chambers had its *situs* in New Jersey, and therefore was not within the jurisdiction of the Pennslvyania courts. But the difficulty with this argument is that it goes too far, and would defeat all foreign attachments so far as relates to reaching debts due the defendant in attachment, because they would all be held to have their *situs* with the non-resident defendant out of the state, and so be beyond the jurisdiction of the state.

Some confusion and seeming inconsistencies are found in the books, growing out of a failure to distinguish between the character of the two kinds of chattels which are sought to be reached by foreign attachment, viz., tangible chattels and choses in action.

In order to obtain a lien upon tangible chattels, which alone are subject to seizure and levy, it is necessary that there should be an actual or constructive manucaption by the officer. It is certainly so in this state under our system of procedure, and I think also in most of the other jurisdictions. To effect this actual seizure and levy it is necessary that the chattel should be within the jurisdiction and within the physical power and reach of the officer. Hence the canon that the *res* must be within the jurisdiction. The failure to distinguish in this respect between tangible chattels and choses in action has led to the erroneous notion that the debt or right of action, in order to be reached, must also be within the jurisdiction. But this is not so, for the reason that the debt is incapable of actual seizure, and hence none is necessary. On this point I adopt the language of the supreme court of Vermont in *Cahoon* v. *Morgan, 38 Vt. 236:* "It is true that the trustee process is sometimes called 'attaching a debt,' because it creates a lien upon the debt as attachment does upon personal property. But the validity of the two kinds of liens rests on wholly different grounds. Attachment of personal property must be by taking possession of it. But no possession can be taken of a debt. To make the lien valid against the debt, all that is required is notice to the debtor (garnishee) of the suit, a mere summons."

In cases of seizure of tangible chattels it is also necessary that there should be a declaration in the nature of a publication of the attachment in the presence of the person having the custody of the chattels seized, and this provision has led to the, as I think, erroneous notion that the person so having the custody may be garnished, and so made in some way and to some extent personally liable as such because of his custody. But such declaration or publication in the case of a tangible chattel is not, properly speaking, a "garnishment," and as frequently as the question has arisen it has been held that no such liability can attach to the mere custody of chattels, provided the custodian is ready and willing to yield their possession to the custody of the law.

It follows that the real and only liability of a party as garnishee is by reason of his owing a debt to the defendant in the suit, and the garnishment consists in nothing more than a "warning" to him not to pay the debt to his creditor until the plaintiff's debt is satisfied. In process of garnishment, as thus understood, the fact that the debt subject to be garnished has its *situs* out of the jurisdiction has never been held to stand in the way of the process of the court.

I come, therefore, to the conclusion that the real and only ground of jurisdiction in case of attachment, over choses in action, is the service, within the jurisdiction, of warning upon the debtor; and when that is done jurisdiction is obtained.

It is not necessary in this case to determine whether such service upon a debtor casually and for a temporary purpose within the jurisdiction is sufficient or not. For in this case, as I have concluded, the complainant had a permanent business residence in the State of Pennsylvania.

The point in this behalf made by Mr. Crandall was taken and overruled by Lord Holt two hundred years ago, as reported in *Andrews* v. *Clerke, Carth. 25*. There the garnishee pleaded to the jurisdiction that the debt due from him to the defendant, and the contract on which it was founded, arose and was made out of the jurisdiction of the sheriff of London's court, which plea was overruled, and thereupon a prohibition was moved for at the bar of the queen's bench, which was denied "because the debt always follows the person of the debtor (creditor) and it is not material where it was contracted, for it was always the custom in London to attach debts upon bills of exchange and goldsmith's notes, &c., if the goldsmith who gave the note, or the person to whom the bill is directed (acceptor), liveth within the city, without any respect had to the place where the debt was contracted." The defendant in this case was, of course, a non-resident.

To the same effect is *Mallum* v. *Hern,* cited in *2 Show.* **507,* decided in the king's bench, in *19 Charles* II.*;* and see *Harrington* v. *MacMorris, 5 Taunt, 228,* and *Banks* v. *Self, 5 Taunt. 233.* Mr. Locke, in his treatise on *Foreign Attachments* (at *p.* **29*), says:

"It has been said that debts arising out of the jurisdiction are not attachable, and that a prohibition will lie. It is, however, the constant practice of the court to attach indiscriminately debts of this description, so that it is quite clear that with regard to simple contract debts, as they follow the person, they may be attached by serving the debtor with an attachment within the city. *And this is the course ordinarily pursued with respect to bankers and others carrying on business out of the city. If an attachment be served upon any one of the partners of a firm, while he is within the city, it is sufficient, although they carry on their business out of the city.* With respect to goods, they must be within the jurisdiction or they cannot be attached in the hands of the garnishee."

These authorities show conclusively that the fact that the *situs* of the debt attached by garnishment of the debtor is not within the jurisdiction is no bar to attachment proceedings, provided the debtor can be lawfully garnished.

The old practice in the city of London courts, as stated by Mr. Locke, agrees with that upheld by the courts of this country in the numerous cases above cited. The mere fact that the legal domicile of the garnishee is without the jurisdiction is not a protection against his garnishment. Take the case of the thousands of persons engaged in business in the great cities of New York and Philadelphia, with all their business houses there, but their legal domicile of residence in this state. With what sort of reason can it be said that none of those can be subjected to garnishment in the jurisdictions where their business is carried on, because their family homes are in another state?

A line of decided cases was cited by Mr. Crandall in opposition to these conclusions, which will now be considered. First of these is *Bowen* v. *Pope, 125 Ill. 28; 17 N. E. Rep. 64.* The suit was by a hardware company of Missouri, by foreign attachment against Bowen, a resident of Missouri, as defendant, and Pope, Lockwood and Heitz, copartners, residents of Illinois, as garnishees. The effort was to charge the garnishees on two separate matters—*first,* a debt due by them to Bowen, which was promptly admitted and paid; *second*—out of which the controversy arose—by reason that one of the firm (Lockwood), at the moment of the service of the attachment in Illinois upon his partners, was in the State of Missouri and had in his manual possession certain promissory notes belonging to Bowen, the defendant in attachment, which, after telegraphic notice of the attachment, he delivered to Bowen on his demand. It was held that the garnishees were not liable on account of such possession and delivery. And I venture to say that it is difficult to imagine what argument having even plausibility could have been made against this result. Promissory notes are not capable of seizure and levy, and the only mode of reaching the debt which they prove is by garnishment of the makers, and not of the mere custodian of the paper script. Be that as it may, the case has no application here, because the facts are different.

The other cases were decided in New York. The first is *Plimpton* v. *Bigelow, 29 Hun 362; 93 N. Y. 592.* The plaintiffs, residents of Massachusetts, instituted attachment proceedings in New York against the defendant, a resident of Pennsylvania, as their debtor, and attempted, under a warrant of attachment—a proceeding under the New York code—to levy upon certain shares of stock owned by defendant in a corporation of Pennsylvania, incorporated under the laws of that state, which had a place of business in New York city, with a president and other officers continually present, and it was held in the supreme court that such levy was good. This judgment was reversed on appeal, on the ground that the shares of stock—the *res*—were not within the jurisdiction of the court. And this was so plain a proposition that I do not see how a question could be raised as to it. In discussing the general question, after dealing with the provisions of the New York code, the learned Chief-Judge Andrews (at *p. 601*) proceeds:

"It is not necessary to this case to define the limits of legislative power, in subjecting intangible property to attachment, by notice served upon such person or corporation as may be designated by the legislature. Manifestly the *res* cannot be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere. But in respect to intangible interests, as we have said, there can be no actual seizure of the thing, and it can be bound only by notice to some one who represents the thing. In case of a debt, notice to the debtor residing within the jurisdiction is the ordinary proceeding to attach the debt, and if the debtor is a corporation, and the corporation is a domestic one, there is no difficulty. But in some of the states, foreign corporations, having an agent or place of business within the state, may be charged under what is called the trustee process, or as garnishee. In these proceedings the trustee or garnishee is joined with the principal defendant as a party to the action, and the debt owing by the trustee or garnishee is ascertained, and the liability of the trustee and garnishee is adjudged in the action. *There may be no difficulty upon principle in compelling a corporation, which has an agent and officer in another state and is transacting business there, to respond in garnishment proceedings for the debt, although the creditor—the principal defendant—is a non-resident, and if bound to respond it is certainly just that the judgment which compels the corporation to pay the debt to the plaintiff should protect it in making such payment, against a subsequent claim by its creditor.* We do not enter into this question here. But whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-resident, by service of notice on an agent of the corporation within the jurisdiction, we think in respect to corporate stock, *which is not a debt of the corporation, in any proper sense,* it would be contrary to principle to hold that it can be reached by such a notice. We are, therefore, of the opinion that the fundamental condition of attachment proceedings that the *res* must be within the jurisdiction of the court in order to an effectual seizure, is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here, and that section 647 must be construed as applying to domestic corporations only."

It is plain, from this extract, that the decision does not touch the question involved in our case, and the *dicta* are favorable to the jurisdiction here brought in question. It will be seen hereafter that the learned judge, who thus wrote, declined in a later case to follow his suggestions as to jurisdiction over corporations with foreign domicile of origin.

The next case is *Strauss & Terry* v. *Chicago Glycerine Co., 46 Hun 216,* where the opinion is found. The judgment was affirmed on appeal (*108 N. Y. 654*), without opinion. In that case an English fire insurance company had met with a loss by destruction by fire of property in Chicago, owned by the defendant, upon a policy negotiated and issued there. It had also an agency in New York. An attachment was issued by plaintiffs, New York creditors of the defendant, and garnishee process was served on the insurance company. A motion was made and refused, at special term, to set aside the attachment, because not efficient under the code. Upon appeal to the general term of the supreme court the motion prevailed upon grounds thus stated by the learned judge: It will not be necessary to determine whether a lawful attachment of the indebtedness could be made under subdivision 2 of section 649 of the code of civil procedure, without taking actual possession of the policy itself, for this policy was not issued by the New York agency, but the negotiations for it took place in the city of Chicago, and it was there delivered to and held by the defendant. The indebtedness, accordingly, was not property which the defendant had within this state, and under the construction given to the code of civil procedure, in *Plimpton* v. *Bigelow, 93 N. Y. 592,* it could not be seized under this attachment. It is true that the service of the attachment in that case was attempted to be made upon shares of the defendant in the corporate stock of a company, but that circumstance does not seem to render the decision then made inapplicable to this case. [The judge here overlooks the declaration in the other opinion that shares of stock are in no sense a debt.] By the shares which the defendant held, he was entitled to a proportionate part of the earnings of the corporation and if its property upon its dissolution, while in the present case the defendant was entitled, under the policy, to the payment of so much money as would compensate it for the loss sustained by the destruction of its property by fire, so far as the policy covered such loss. The property itself in each case has several attributes of similitude, rendering the decision in the case referred to applicable to the service made of the attachment in this action." After referring to decisions of other states to the contrary, he proceeds: "But it is not important to pursue the consideration of other cases, since that of *Plimpton* v. *Bigelow, supra,* maintains the general proposition that the presence of the person or thing within the state is indispensable to the power of the court to acquire jurisdiction over it in this manner."

It is here to be observed that the only part of the opinion in the previous case of *Plimpton* v. *Bigelow,* which could apply to the later one, was this expression: "In case of a debt, notice to the debtor residing within the jurisdiction is the ordinary proceeding to attach the debt." There is no warrant in that previous opinion for the notion that the relation between a corporation and its stockholders is that of debtor and creditor. But the contrary is distinctly affirmed, and the decision is put on other grounds. I feel confident that the reason for the decision in *46 Hun* is entirely fallacious, for the reason that there is, in fact, no analogy, for present purposes, between a debt due by a corporation and its obligation to its stockholders. The latter, for purposes of book-keeping, is called a debt, but no suit can be brought upon it as for a debt; and that is the test of a debt for purposes of garnishment. *Drake Att.* § *541 et seq.* Stock in a corporation cannot be levied upon by an ordinary execution against the holder, except by special statutory provision, and it would be most unjust to hold a corporation liable as garnishee upon its stock when it cannot relieve itself from liability by delivering the stock over to the sheriff or other officer serving the writ.

The next case is *Douglass* v. *Phoenix Insurance Co., 138 N. Y. 209.* In that case the insurance company, defendant, had its legal domicile in New York, and owed to Douglass, the plaintiff, also a resident of New York, a debt arising out of a loss by fire occurring in New York. The insurance company also did business in Massachusetts, and had there the same sort of domicile, for the purpose of suit, that complainant herein had in Pennsylvania. This debt was attached by a creditor of Douglass, residing out of New York, by foreign attachment served in Massachusetts on the duly authorized agent of the company (at *p. 217*), and this Massachusetts proceeding was pleaded to an action afterwards brought by Douglass against the company in New York, and was held by the courts of that state to be no defence.

The case varies in its facts from the present one in that the insurer (defendant debtor) had the same legal domicile (New York) with the insured (plaintiff creditor), while here it has a different domicile. The cases would be parallel if the insurance company in this case had its domicile of nativity in this state. This difference may of itself be sufficient to distinguish it and prevent its application here. However, it is undeniable that the opinion states propositions which, if sound, are well-nigh fatal to the claim of the attaching creditor in this case, and therefore merit consideration.

It was conceded in that case, for the purposes of the argument (at *p. 217*), that by the laws of Massachusetts the debt in question was properly attachable there by process of garnishment served upon the local agent of the insurance company, and that judgment might go therein against it, with the result that the insurers might be compelled to make double payment. Of this the learned Chief-Judge Andrews (at *p. 221*), says: "We deem it unnecessary to consider the position of the defendant. If it may be subjected to embarrassment, or even to a double judgment, it will be in consequence of its own act in voluntarily subjecting itself to the laws of Massachusetts. The power of the court to grant a continuance in a proper case will generally afford a remedy to a party so situated." Here I understand the court to refer to the probability that the Massachusetts court will not proceed with its judgment in attachment against the garnishee upon being properly informed that the New York court has proceeded to judgment against him in New York. Now it is to be observed that the complainant in this case has tried that experiment. It has set up in defence to garnishment in the Datz attachment suit in Pennsylvania the suit brought by Chambers in this state, and the Pennsylvania court has refused to recognize it, on the palpable ground that the Philadelphia attachment, being prior in time, was best in right, and worked a transfer of the credit from Chambers to the plaintiff in attachment. And it is difficult to see why it was not quite as much the duty of the New York court, in the *Douglass Case,* to grant the continuance as it was that of the Massachusetts court. At least, the propriety of that course by the New York court has the sanction of the authority of Chief-Justice Kent and his associates in the leading case of *Embree* v. *Hanna, supra.*

And I further suggest that the fact that a party owing a debt may be subjected to the injury of being compelled to pay it twice—once directly to his creditor, and then again to a third person for the benefit of his creditor, and so, in effect, indirectly to his creditor a second time—has always been treated by courts desiring to do justice as a matter of serious consideration, and, in fact, the one thing to be guarded against. *Drake Att. 699.*

The learned chief-judge (at *p. 219*) proceeds: "No state can subject either real or personal property out of the jurisdiction to its laws. * * * It is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction. In the case of movables, their seizure under the attachment shows that their actual *situs* is within the jurisdiction. But in respect to intangible interests, debts, choses in action, bonds, notes, accounts, interests in corporate stocks and things of a similar nature, the question whether the *res* is within the jurisdiction of the sovereignty where the process is issued, is not so readily determined. *The general rule is well settled that the situs of debts and obligations is at the domicile of the creditor.* But the attachment laws of our own and of other states recognize the right of a creditor of a non-resident to attach a debt owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned, *that the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor.*"

Now, here I venture to suggest that the learned judge here concedes the whole question, because, as I have before observed, if the *situs* of the debt is at the domicile of the creditor, then it never can come under the jurisdiction of a foreign attachment against him, because he is always in such case out of the jurisdiction of the court issuing the attachment. To admit that jurisdiction may be exercised over a debt due to a non-resident is either to admit that the presence of the *res* within the jurisdiction is not necessary, or else to assert, as, in fact, the chief-judge does assert, that a state may arbitrarily change the actual *situs* of a chose in action not within its jurisdiction, and declare it to be within the jurisdiction, contrary to the fact. There is no escape from this dilemma.

The chief-judge proceeds: "But, we repeat, no court can acquire jurisdiction in attachment proceedings unless the *res* is either actually or constructively within the jurisdiction [I have already shown the fallacy of this position], and we are of opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the insurance company, by serving upon the agent of the corporation there, and without having acquired jurisdiction of the plaintiff, must fail for the reason that the debtor, the insurance company, was in no just or legal sense a resident of Massachusetts and had no domicile there, and was not the agent of the plaintiff, and that in contemplation of law the company and the debt were at the time of the issuing of the attachment in the State of New York, and not in the State of Massachusetts." As a reason for this statement he adds: "If in this case the insurance company could be regarded as residing or having its domicile in Massachusetts for the purpose of attachment proceedings, it likewise has a domicile in every state where it may have appointed an agent under similar laws, and so, constructively, upon the theory upon which the Massachusetts attachment is defended, the corporation is present as debtor to the plaintiff in every state where such agency exists, and the credit is also present at the same time in each of such jurisdictions. *The admission of such a principle would give rise to most embarrassing conflicts of jurisdiction and subject creditors of domestic corporations to great prejudice.* We think the rule is that a domestic corporation at all times has its *exclusive residence and domicile in the jurisdiction of origin,* and that it cannot be garnished in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over the person of such creditor."

Now, with great deference, I venture to say that this argument, *ab inconvenienti,* so forcibly put, has not, in practice, the weight given to it by the learned chief-judge. A fundamental and familiar rule intervenes and prevents the inconveniences there mentioned and relied on, and that rule is that the *first* assignment of the debt, whether it be by the voluntary action of the creditor, or whether it be by operation of law, such as insolvent or bankrupt proceedings, or proceedings in foreign attachment, will take and hold the debt, and, in whatever jurisdiction that assignment is set up, the first principles of justice require that it should be recognized, and all subsequent assignments or attachments should give way to it. This fundamental rule of justice, I submit, was overlooked by the New York court.

As to the concession that, by the laws of Massachusetts, the courts of that state had jurisdiction to attach the debt there in question, the learned chief-judge makes this answer: "But it is only jurisdiction in an international sense, or according to the course of common law, and judicial proceedings which conform to, or, rather, which are not taken in disregard of the principles and rules of general jurisprudence which this state is bound to recognize, and if the laws of Massachusetts go to the extent claimed, and assume to authorize attachment proceedings to seize a credit owing to a resident of this state, when neither the debtor nor creditor are within the jurisdiction, this state is not, we think, bound to recognize them. *The law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, at least so as to bind another* *jurisdiction by the declaration*." To which I answer, why not the same power to make a debtor a resident of the state as to arbitrarily change the *situs* of the debt from the domicile of the creditor to that of the debtor? And yet this is precisely what was done by the New York court.

But if the proposition stated in the last-quoted sentence be admitted to be sound, it does not meet the case in hand, for the legislation under review not only provides that the foreign corporation shall be, *pro hac vice*, a resident of the state where it is doing business, but it provides for the solemn consent of the foreign corporation thereto, and if the foreign corporation does, in fact, consent thereto, as it has done in this case, wherein does the result infringe upon any fundamental law of justice? Why should not a corporation have, *pro hac vice*, two or more domiciles, or, rather, business residences?

It is not necessary to consider whether or not the state creating the corporation might not, by statutory limitation, forming part of its corporate existence, prevent its acquiring a domicile elsewhere, since no such original limitation was present in the New York case or is present in the case now in hand; and, as before observed, the fact that these corporations do have this sort of multiple domicile is well known, and was presumably known by Douglass, the plaintiff in the New York case, when he took out his policy in the defendant company therein. What injustice, then, I repeat, was inflicted upon Mr. Douglass in having his debt applied, against his will, to the payment of a just debt due by him? And what sort of justice is that which would compel the payment by the defendant of its debt to Douglass first, to a creditor in Massachusetts for Douglass' benefit, and, second, the payment of the same debt to Mr. Douglass in person, so that he (Douglass) would have the money in his pocket and at the same time have his debt paid? The injustice of that result was strongly set forth by Chief-Justice Kent, in *Embree* v. *Hanna, supra*. He there assumes that the court will never subject a party to the risk of paying his debt twice, and such is the universal rule pervading all the cases on this subject, and it seems to me that it did not have proper weight with the court in *Douglass* v. *Insurance Co.*

The ability of natural persons to have a domicile of actual residence in one state and a *quasi*-domicile or residence, for business purposes, in another state, has already been alluded to. Not only are there thousands of natural persons who are residents of New Jersey yet have their entire business residence and actual presence in the cities of New York and Philadelphia, but there are hundreds of corporations organized under the laws of this state, and recognized as corporations domiciled in this state, whose places of business and business plant are in our neighboring states. Now, I think, the courts of New York, notwithstanding the decision just referred to, will hesitate before applying these doctrines to such persons and corporations.

But I return to the question above put, and I assert that there is no difficulty in holding that a corporation may have two domiciles, at least for purposes of suit. *Dic. Dom. pp. 110, 112.*

In *Carron Iron Co.* v. *Maclaren, 5 H. L. Cas. 416*, Lord St. Leonards (at *p. 449*) says: "I think that this company may properly be deemed both Scotch and English. It may, for the purposes of jurisdiction, be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purposes of jurisdiction, properly be deemed the domicile. *The corporation cannot have the benefit of its place of business here without yielding to the persons with whom it deals a corresponding advantage.*" And, again (at *p. 459*): "There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction—one in Scotland and one in England—and, for the purpose of carrying on their business, one is just as much the domicile of the corporation as the other."

This language was cited with approval by Mr. Justice (afterward Lord) Blackburn, in a considered judgment, speaking for himself, Chief-Justice Cockburn and Justices Mellor and Quain, in *Newby* v. *Colt Co., L. R., 7 Q. B. 293, 295* (*1871*); and the court in that case held that the Colt company, though created by legislation of one of the United States, had a residence in England, and was liable to be sued by ordinary process there, because it had a place of business and was carrying on business there. Now, if that be so, does it not follow inevitably that it was liable to proceedings in garnishment, if any such there be, in England, by reason of debts owing by it to a non-resident of England against whom process by foreign attachment may issue?

And see *Haggin* v. *Comptoir d'Escompte de Paris, 23 Q. B. Div. 519*.

This capacity of a corporation to have a multiple residence for the purposes of suit has been recognized by the courts of our own state. In *Moulton* v. *Insurance Co., 4 Zab. 222* (at *p. 233*), this language was used by Judge Elmer: "By the comity universally acknowledged in the states of this union, and acted upon by the supreme court in the case of *Bank of Augusta* v. *Earl, 13 Pet. 519*, corporations may send their officers and agents into other states, transact their business and make contracts there; and in some instances the laws of the states prescribe the mode and the terms upon which they may do so. *I am not prepared to say, that if they choose to avail themselves of this privilege, natural justice will be violated by subjecting their officers and agents to the service of process on behalf of the corporation they represent; on the contrary, I think natural justice requires that they shall be subject to the action of the courts of the states whose comity they thus invoke. For the purpose of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that state.* Any natural person who goes into another state carries along with him all his personal liabilities, and there is quite as much reason that a corporation which chooses to open an office and transact its business, or to authorize contracts to be made in another state, should be regarded as thereby voluntarily submitting itself to the action of the laws of that state, as well in reference to the mode of commencing suit against it, as to the interpretation of the contracts so made."

And in *Bank* v. *Delaware, Lackawanna and Western Railroad Co., 3 Dutch. 206,* it was held that a foreign corporation holding lands and doing business in this state by legislative permission is not liable to a foreign attachment, but can be served by ordinary process.

And in *McGregor, qui tam,* v. *Erie Railway Co., 6 Vr. 115,* it was held that the defendant should be considered a corporation of this state as well as of New York. The learned Judge Bedle (at *p. 118*) says: "It is true that the Erie Railway Company is a foreign corporation, yet, at the same time, it is domestic to the full extent of the powers and franchises confirmed and invested in it here in New Jersey. A corporation may have a two-fold organization, and be, so far as its relation to our state is concerned, both foreign and domestic. It may have a corporate entity in each state, yet in its general character be of a bi-fold organization. This doctrine is sustained not only upon principle but by the following cases. * * *." This language applies to the case in hand.

The result of my study of the New York cases is that I find them standing well-nigh alone among the modern decided cases, several of which I have already cited. Their reasoning does not convince me that the assumption of power by the Pennsylvania court in this case was invalid when tested by the general principles of international law and natural justice.

It is admitted in this case that Chambers was largely indebted to Harding, Whitman & Company. There is no claim in the case that he did not have notice of the attachment in Pennsylvania, while the contrary is proven. Proof was made to the satisfaction of that court of the debt due from him to Harding, Whitman & Company, and they have, besides, sued in this state and obtained judgment, after personal service upon him, for the same debt. It will be no injustice to him to apply this debt of the complainant to him toward the payment of his indebtedness, *pro tanto,* to Harding, Whitman & Company. But it will be a great injustice to complainant to compel it to pay this debt twice. That consideration would lead me to decide in favor of Harding, Whitman & Company, even if I were in doubt (which I am not) as to the soundness of the rulings of the Pennsylvania courts.

I will advise a decree that the fund in court be paid to Harding, Whitman & Company, and that they recover against Mr. Crandall accordingly the costs paid out of the fund to the complainant, and also their costs herein; and that Chambers and Crandall and all persons claiming under them be perpetually enjoined from bringing or maintaining any action upon the policy of insurance in question.

CONTRACTS.

FISHER v. OTIS, 3 WIS. (PINNEY'S) 78, (1850).

APPEAL from the Circuit Court for *Racine* County.

The case was that *Fisher* and *Robinson* filed their bill in equity against *Otis* and others to foreclose a mortgage executed by *Otis* and wife to James S. Wiggin, securing the payment of a promissory note, given by *Otis* to Wiggin, for $15,000, payable one year after date, with interest after due at the rate of twelve per cent., payable semi-annually at the city of Boston, Mass. Wiggin assigned the note and mortgage to the complainants before the note became due, but the assignment of the note and mortgage was made expressly "subject, however, to all the rights of the said *Otis* and his wife in and to the same." It was agreed that *Otis* had paid on the note and mortgage $11,200, and the complainants claimed a decree for the balance, computing interest as specified in the note.

The defendant *Otis* in his answer, which was a sworn one, denied that at the time of the execution of the note he owed Wiggin $15,000, and alleged that the note and mortgage were given to secure a balance of account and future advances, and insisted that the note was usurious by the laws of Massachusetts where it was to be paid, there the highest lawful rate of interest being six per cent.

The complainants claimed to be *bona fide* purchasers of the note and mortgage, without notice of any defect in or defense against them, and a question was also made, whether there was sufficient testimony to overcome the allegations of the answer of

Otis, stating that the note and mortgage were given mainly for future advances and his account as to the amount due thereon; also whether the burden of proof was on the mortgagor or mortgagee in case of a mortgage for future advances, to show the amount of such advances.

The court found from the answer of *Otis* and other proofs, that he was indebted to Wiggin for the difference in the amount of an invoice of goods at Detroit and at Boston, $811.55, that Wiggin advanced to him at Southport, Wisconsin, where the note and mortgage were executed, $9,000, and also subsequently the further sum of $2,162.73 on a letter of credit, and amounting in all to $11,974.28.

Upon this basis the circuit court made its decree, allowing interest on the advances at seven per cent. from the time when they were respectively made, which, after deducting the admitted payment, left due the complainants $135.77, for which sum and costs a decree of foreclosure was entered, and the complainants appealed.

HUBBELL, J. The respondents contended that the note and mortgage, being made to draw interest at twelve per cent., were usurious under the laws of Massachusetts, which allow of only six per cent. A sufficient answer to this objection might be found in the fact that no interest was payable until the money became due. The note was payable at "one year from date," and was to draw interest "*after* one year, at the rate of twelve per cent. per annum." If the money had been paid at the maturity of the note, no interest would have been demandable. The legal obligation was to pay at the end of a year, and the maker might have discharged his obligations without paying any interest. If he neglected to pay, or, in other words, violated his agreement, the interest which follows might properly be regarded as a penalty to recover damages. 4 Peters, 225. At all events, it seems to me to be a solecism in law to hold an instrument usurious which may be legally discharged by the obligor agreeably to its terms without paying any interest at all.

But waiving this consideration, how far is the objection tenable? The note and mortgage were executed and delivered in

Wisconsin, where twelve per cent. interest was lawful; but the money was payable in Boston.

By the statute of Massachusetts, in case the note had been sued in that state, the defendant might have set up usury, *in a special plea,* and by so doing, reduced plaintiff's recovery, by a sum equal to three times the excess above six per cent. Rev. Stat. Mass., ch. 35.

But this statute expressly declares that no contract whereby usurious interest is secured shall be thereby rendered void. Id., ch. 35, sec. 2. The provision only extends to a reduction of the recovery, upon a plea filed for that express purpose.

In the language of their own courts, it "professes only to regulate the remedy upon a usurious contract. And that remedy must be applied in an action in the courts of Massachusetts. The courts of this state are not bound by their remedial laws. The remedies we enforce are those provided by our own laws.

This is a general principle, so universally acknowledged as scarcely to need the support of authority. But there happens to be a case precisely in point:

In *Gale v. Eastman,* 7 Met., 14, the supreme court of Massachusetts refused to enforce the usury law of New Hampshire, which is almost identical with her own, upon a note made in New Hampshire, and which clearly would have been held usurious in that state. Had the statute vitiated or affected the contract itself, the rule would have been different.

It is said, however, that this note being made payable in Boston, is to be governed in its construction and legal effect, by the laws of the state where it is to be performed. The general rule unquestionably is, that *"the lex loci contractus controls the nature, construction and validity of the contract."* 2Kent, 454. And a contract, valid *where it is made,* is valid *everywhere.* From this rule, however, contracts made in one country, but *to be performed* in another, have very generally been excepted. And the reason of the exception is, that the parties are supposed *to intend* to be governed by the laws of the country where their contract is to be performed, or to take effect.

For this reason, a note made in Canada, but payable in England, wherein the rate of interest was not specified, has been held to draw interest according to the laws of England. And so a bond made in England and payable in Ireland, in which the rate of interest was not fixed, was held to bear *Irish* interest. *Champart v. Lord Ranelagh,* approved by WILMOT, J., in *Robinson v. Bland,* 2 Burr., 1084. And the same principle has been asserted in a great variety of cases on both sides of the Atlantic. But I think the doctrine of construing all contracts by the law of the place of performance has sometimes been carried too far; and when applied rigidly, it defeats the very reason on which the rule is founded. This doctrine is derived from a *dictum of* HUBERUS, in his celebrated work *De Conflictu Legum*—a work which had the great merit of bringing order out of the immense confusion prevailing in continental Europe on the subject of the *lex loci;* and which remains to this day a high authority, both with the civilians and common law judges. 2 Kent's Com., 454. But it may be well worth our while to go back and examine the language of HUBERUS himself.

After laying down the general and acknowledged principle, that contracts are to be governed by the law of the place where they are made—the *lex loci contractus*—the learned author states an exception to the general rule in these words:

"*Verum tamen non ita praecisa respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respixerint, ille non potius sit considerandus. Nam contraxisse unus quisque in eo loco intellegitur, in quo ut solveret, se obligavit.*"

The first portion of this extract contains the *principle* and *the reason* of it; the latter part is a mere *dictum,* or rule of construction. As I understand the doctrine, it is that the *place of making the contract* is not to be so exclusively regarded, but that, when the contracting parties themselves had reference *to another place,* that may be regarded. That is, the intention of the parties shall govern when it is made manifest. And hence, the author adds, every person *is deemed* to have contracted in the place where he binds himself that his contract shall be performed. Now, this is generally, but not universally true. And the same reason which requires a contract to be governed by the law of the place of performance, when it is intended so to be, shall require it to be governed by the place where it is made, when such was the design of the parties. When the court can see clearly, either from the contract itself, or from evidence *aliunde,* that the parties intended to have it governed by the law of the place of its actual execution; as, when, for instance, the contract would be lawful at that place, and not lawful at the place of performance, then clearly the intention of the parties ought to prevail.

To adopt a different rule of construction would defeat a contract made in good faith, in the usual course of trade and business. Courts are bound so to construe all contracts, if possible, as to give them effect rather than to defeat them. LORD HALE quaintly says, "the judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties." 2 Lev., 9. And if the doctrine of HUBERUS required a different mode of construction (which surely it does not), it would have to give way to the older and better rule of COKE: *"Ut res magis valeat quam pereat."*

In this country, composed of widespread and independent states, differing in governments and laws, where multitudes of contracts daily spring up, diversified in their form and purpose, and having reference to subject matters as remote as the persons contracting, it is of vast importance that a rule of construction should be adopted which will give efficacy to the intentions of the parties, wherever they may make their engagements or undertake to fulfill them. And if a too rigid rule has prevailed, or if a mistaken application has sometimes been made, of a rule founded in reason, it is well to restore our decisions from the path of mere authority, to that of common sense and justice.

Though the citizens of almost all the states are connected more or less in business transactions, the laws regulating the interest of money and the remedies under them are exceedingly diversified.

Occasions often arise in which it is desirable to have the rate of interest prevailing in one state secured by a contract which is to be performed in another. Is there any good reason, either in law or public policy, why the intentions of the parties to such a contract should not prevail? Why such a contract should not be enforced according to its terms, clearly and definitely expressed, whether the suit be brought in the place of its execution, or in the nominal place of its performance?

Laws relating to interest or usury cannot surely at this day be regarded as involving a question of morality. And where there is no pretense of any attempt to evade the law of the place where the contract is to be performed, I see no ground for refusing to enforce it in the state where it was made; and if there, everywhere.

This principle has already been enforced to this extent, by the learned court of a sister state, if I understand rightly the case of *Depeau v. Humphreys,* decided in the supreme court, Louisiana. 20 Martin, 1.

I have not been able to examine the reported case; but Chancellor WALWORTH, of New York, himself an authority of high consideration, thus speaks of the decision: "That court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, *although the rate of interest thus agreed to be paid was higher than that which could be taken upon a loan by the laws of the state where such note was made payable."* In other words, the note was sued in the state where it was made, and the law of the state where it was to be performed was not allowed to prevail.

But that decision goes further than the case now under consideration requires. It is one thing to enforce a contract entirely personal in its character, and which may be prosecuted wherever the person or property of the obligor is found, and quite a different thing to enforce a security upon land, which must necessarily be prosecuted in the place where the land is situated. The appellants are seeking to recover upon a mortgage executed in Wisconsin, upon lands in Wisconsin, and made in conformity to the laws of Wisconsin.

It may be well supposed that the parties intended to contract under the laws of Wisconsin, and to seek their redress under those laws, although the money secured was made payable in another state. On the continent of Europe the distinction has long prevailed, between what is termed personal and real statutes. "The laws which regulate the condition, capacity or incapacity of persons are personal statutes; and those which regulate the quality, transmission and disposition of property are real statutes." 2 Kent's Com., 456.

This distinction was asserted as a rule of judicial action, by Chancellor WALWORTH, in the case of *Chapman v. Robinson,* 6 Paige, 627. That was a loan of money made in England, upon the security of a bond and mortgage executed in New York, upon lands in that state, but delivered in England and payable there, where the money was in fact placed to the credit of the borrower. The rate of interest was seven per cent. per annum, a rate legal in New York, but usurious in England.

Upon a bill filed to foreclose the mortgage, and the defense of usury set up, the Chancellor held the mortgage valid, and decreed its payment, with seven per cent. interest. In the course of a learned and able discussion of the subject, he remarks:

"It is an established principle, that the construction and validity of contracts, which are purely personal, depend upon the laws of the place where the contract is made, unless it was made in reference to the laws of some other place or country, where such contract, in the contemplation of the parties thereto, was to be carried into effect or performed." 2 Kent's Com., 457; Story's Conf. of Laws, 227, sec. 272.

On the other hand, it appears to be equally well settled by the laws of every state or country, that the transfer of lands or other heritable property, or the creation of any interest in, or lien or incumbrance thereon, must be made according to the *lex situs,* or the local law of the place where the property is situated." And after discussing at length the effect of making the money payable in England, and the views of Mr. Justice STORY and Chancellor KENT upon kindred cases, he says: "But neither he nor Chancellor KENT appear to have expressed any opinion upon the precise question presented in the present case, in which the rate of interest reserved *is allowed by the law of the place where the mortgaged premises are situated, and where the bond and mortgage were actually executed, but is more than could be legally reserved by the law of the place where the money was received, and where, by the legal construction of the contract, it must be deemed to be payable.* Upon a full examination of all the cases to be found upon the subject, in this country or in England, none of which, however, appear to have decided the precise question which arises in this cause, I have arrived at the conclusion that this mortgage executed here, and upon property in this state, being valid by the *lex situs,* and which is also the law of the domicil of the mortgagor, *it is the duty of this court to give full effect to the security, without reference to the usury laws of England,* which neither party intended to evade or violate by the execution of a mortgage here."

And again, he says: "And being actually *made in reference to our laws,* and to the rate of interest allowed here, *it must be governed by them,* in the construction and effect of the contract, as to its validity. See also 7 Paige, 632. I am aware that these views have received reproof in a high quarter (Story on Conf. of Laws, sec. 293 c. and note), but I think, more in deference to authority than reason.

But the case of *Chapman v. Robinson,* both in fact and in reason, runs parallel with that under consideration; and the decision in the one must be held conclusive in the other. It seems to me that the learned court of New York has rescued a sound principle from the conflict of authorities, and made an application of it, which, however novel or unprecedented, must stand the test of time and scrutiny. To have decided differently would have defeated the intention of the parties and rendered nugatory a contract, entered into in good faith and agreeably to the laws of the great and commercial state where it was executed. And upon this ground, if there were no other defense to the mortgage of *Otis,* this court would be bound to decree its full payment, with 12 per cent. interest, according to its terms and in conformity to the laws of Wisconsin, without reference to the usury laws of Massachusetts, which there was no intention to evade or violate.

The note and mortgage, however, as I have before stated, were given not for an actual debt of fifteen thousand dollars, but to secure a less sum, partly advanced prior to their execution, and partly to be advanced afterwards. What interest was to be paid, if any, upon the sum actually secured, is a matter of inference or conjecture. Though the members of this court agree in the opinion that interest, at some rate, ought to be allowed, they do not concur in the rule to be applied. As no rate was specified, and as the money was to be paid in Boston, it is urged that six per cent., the legal rate of interest in Massachusetts, should govern. Again, as the action is brought in this state, and this is the *situs* of the property to be made available as a security; as this is the domicile of the mortgagor, and as the court holds the parties to have had reference to the laws of this state in making their contract, it is urged that seven per cent., the legal rate of interest in Wisconsin, should prevail. So the court below determined. Again, it is urged that the parties themselves having agreed upon twelve per cent., as the rate of interest, in case the entire fifteen thousand dollars had been advanced, they must be deemed to have intended that rate of interest to be charged upon any less sum advanced.

It becomes unnecessary, however, for the court to make any decision upon this mooted question. By a stipulation entered into between the parties on the ninth of May, 1849, the respondent has paid the sum of eleven thousand and two hundred dollars; and the decree of the circuit court, from which the present appeal is brought, directs the payment to the appellants of a further sum of $135.77—making in all $11,335.77.

After a full and careful examination of the pleadings and testimony, we are none of us able to discover that James S. Wiggin, the mortgagee, had paid or advanced to or for the mortgagor, any sum or sums which, with interest at twelve per cent. from the date of payment, would amount to $11,200 on the ninth of May, 1849. And if the case were now open for an original decree on the merits, this court would be compelled to find a less sum due than was found by the court below. It is not necessary, therefore, to decide what rate of interest ought to govern, nor need we enter into a detail of the facts from which we draw our conclusion, as to the actual amount due from *Otis* to Wiggin.

It is sufficient that it has been already paid or decreed to be paid; and the appellants have no further rights in the premises.

Decree of the court below affirmed, with costs.

MILLER v. WILSON, 146 ILL. 523, (1893).

APPEAL from the Appellate Court for the Second District.

This was an action of assumpsit, brought by Matthew M. Miller, against Robert R. Wilson, to recover a balance due on the purchase price of certain lots in Clay Center, Kansas, under an alleged contract of sale made by Miller to Wilson.

On a trial of the cause before a jury the plaintiff recovered a judgment for the amount claimed. The defendant appealed to the Appellate Court, where the judgment was reversed.

MR. JUSTICE CRAIG delivered the opinion of the Court:

Conceding the facts to be as found by the Appellate Court and recited in its judgment, the question is whether the judgment rendered by that court is one authorized by the facts. The contract sued upon was executed in Kansas. It related to lands in Kansas, and the Appellate Court reversed the judgment rendered in the circuit court on the contract, on the ground that there was no memorandum signed in writing by the defendant, and the contract was within the Statute of Frauds of this State, and hence an action could not be enforced upon it. It will be observed that the Statute of Frauds of Kansas, where the contract was executed and where the property sold was located, was not pleaded, but the plea of the defendant set up the Statute of Frauds of this State. It will also be observed that the record contains no evidence whatever that the State of Kansas has enacted a Statute of Frauds, or that there is any law in that State requiring a contract relating to the sale of lands to be in writing. If, therefore, the contract in question was valid in Kansas, (and it must be so held in the absence of a law in that State to the contrary,) and is to be controlled by the laws of that State as to its validity, then the judgment of the Appellate Court was erroneous. On the other hand, if the contract is to be governed by the laws of this State, where the action was brought upon it, then the decision of the Appellate Court was correct. The question, therefore, to be determined is, whether the *lex loci contractus* is to control, or whether the contract shall be governed by the *lex fori.*

As a general rule, a contract valid in the State where it is executed may be enforced in another State. Thus, in *Roundtree* v. *Baker,* 52 Ill. 241, this court held, where an instrument executed in the State of Kentucky, prior to the abolition of slavery, for the purchase price of a negro slave sold there, was sued upon in this State, that the contract, being valid and enforcible where it was made, will be enforced in our courts under the law of comity, notwithstanding such a contract could not have originated here, by reason of slavery being prohibited in this State. It is there said: "It is a general rule that we look to the law of the place where the contract is entered into, and not where it is to be enforced, to ascertain its validity. Not only so, but in expounding its terms and conditions." Sutherland on Statutory Construction (sec. 471) says: "The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge and measure of efficacy of its enforcement. A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity."

It is a familiar rule that the laws existing at the time and place of the execution of a contract enter into and form a part of the contract. Thus, in *Edwards* v. *Kearzey,* 96 U. S. 595, it is said: "It is the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement."

A very interesting case on this subject is *Cochran* v. *Ward,* 29 N. E. Rep. 795, and as the opinion in that case refers to and quotes from a number of authorities, we quote from the language of the opinion: "In the case of *Law* v. *Andrews,* 1 Story, 38, it was held that a contract for the sale of goods in France, if valid there, would be enforced in this country, though within the Statute of Frauds here. In *Scudder* v. *Bank,* 91 U. S. 406, it was held that in an action upon the parol acceptance of a bill of exchange to be performed in Missouri, the Statute of Frauds of the place of the contract should control, as it affected the formality necessary to create a legal obligation. The case of *King* v. *Fries,* 33 Mich. 277, was an action in Michigan upon a contract for the sale of goods in Ohio; it was held that the Ohio Statute of Frauds applied. The case of *Houghtaling* v. *Ball,* 19 Mo. 84, was an action in Missouri upon a contract for the sale of wheat to be delivered in the State of Illinois; it was decided that the Illinois Statute of Frauds obtained. The case of *Anderson* v. *May,* 10 Heisk. 84, was an action in Tennessee upon a lease for lands in Arkansas; the court decided that the Statute of Frauds of the latter State should be allowed to control the contract. *Denny* v. *Williams,* 5 Allen, 1, was an action in Massachusetts upon a contract for the sale of wool in New York, and the defendant set up the New York Statute of Frauds. The court held the answer good, saying: 'As the contract was made in the city of New York, and was to be performed there, the laws of the State of New York must govern us in respect to its construction and performance.' The Supreme Court of Louisiana, in *Vidal* v. *Thompson,* 11 Mart. (La.) 23, said: 'An instrument, as to its form and the formalities attending its execution, must be tested by the law of the place where it was made.' In *Pickering* v. *Fish,* 6 Vt. 102, the court used this language: 'As to the requisites of a valid contract, the mode of authentication, the forms and ceremonies required, and, in general, everything which is necessary to perfect or consummate the contract, the *lex loci contractus* governs, though, with respect to conveyances, or other contracts relating to real estate, the statutory regulations of the place where such estate is situated must be observed.' "

As observed before, the contract involved was executed in Kansas, related to property in that State, and was to be performed in Kansas. Under the authorities cited, the laws of Kansas entered into and formed a part of the contract, and if the contract was valid in that State, although it may be prohibited by our Statute of Frauds, our courts, under the doctrine of comity, in an action on the contract, could do no less than enforce it. If the laws of Kansas rendered the contract void or voidable, for the reason that it related to lands and was not in writing, that was a matter the defendant was bound to plead and prove. As was held in *Smith* v. *Whitaker*, 23 Ill. 367, a contract made in another State or in a foreign country will be presumed to be made in accordance with the laws of the place of its execution, and a violation of those laws, if relied on as a defense, must be pleaded and proved. Here the defendant interposed a plea of the Statute of Frauds, but did not set up that it was the law of or a statute in Kansas. In the absence of an averment that the statute was one of another State, we will presume it was the statute of our own State. But if the defendant had pleaded the statute of Kansas he would occupy no better position, for the reason that no proof whatever was introduced tending to show what the statute or law of Kansas was.

From what has been said, if we are correct, our Statute of Frauds, relied upon by defendant, was no defense. The judgment of the Appellate Court will be reversed, and the judgment of the circuit court will be affirmed.

Judgment reversed.

SCUDDER v. UNION NATIONAL BANK, 91 U. S. 406, (1875).

MR. JUSTICE HUNT delivered the opinion of the court.

It is not necessary to examine the question, whether a denial of the motion to set aside the summons can be presented as a ground of error on this hearing. The facts are so clearly against the motion, that the question does not arise.

Nor does it become necessary to examine the question of pleading, which is so elaborately spread out in the record. The only serious question in the case is presented upon the objection to the admission of evidence and to the charge of the judge.

Upon the merits, the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Mo., the amount of a bill of exchange, of which the following is a copy, viz.:—

"$8,125.00. "CHICAGO, July 7, 1871.

"Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of LELAND & HARBACH.

"To Messrs. Henry Ames & Co., St. Louis, Mo."

By the direction of Ames & Co., Leland & Harbach had bought for them, and on the seventh day of July, 1871, shipped to them at St. Louis, 500 barrels of pork, and gave their check on the Union bank to Hancock, the seller of the same, for $8,000.

Leland & Harbach then drew the bill in question, and sent the same by their clerk to the Union Bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill, unless accompanied by the bill of lading or other security. The clerk returned, and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank, and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago, and had authorized the drawing of the draft; that it was drawn against 500 barrels of pork that day bought by Leland & Harbach for them, and duly shipped to them. The clerk returned to the bank, and made this statement to its vice-president; who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same, and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank.

The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable; and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is, that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the State of Illinois, and the contract having been made in that State, the judgment is to be given according to the law of that State. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus.*

In Wheaton on Conflict of Laws, sect. 401 *p,* the rule is thus laid down:—

"Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law."

Miller v. *Tiffany,* 1 Wall. 310; *Chapman* v. *Robertson,* 6 Paige, 634; *Andrews* v. *Pond,* 13 Pet. 78; *Lamesse* v. *Baker,* 3 Wheat. 147; *Adams* v. *Robertson,* 37 Ill. 59; *Ferguson* v. *Fuffe,* 8 C. & F. 121; *Bain* v. *Whitehaven and Furness Junction Ry. Co.,* 3 H. L. Cas. 1; *Scott* v. *Pilkinton,* 15 Abb. Pr. 280; Story, Confl. Laws, 203; 10 Wheat. 383.

The rule is often laid down, that the law of the place of performance governs the contract.

Mr. Parsons, in his "Treatise on Notes and Bills," uses this language: "If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated." P. 324.

For the purposes of payment, and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (*Young* v. *Harris,* 14 B. Mon. 556; *Parry* v. *Ainsworth,* 22 Barb. 118), are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule, that the place of making the contract governs as to the formalities necessary to the validity of the contract. P. 317. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta* v. *Hatch,* 4 Zab. 319.

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar* v. *Shelden,* 12 Wend. 439.

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent interest, which is legal in that State, the note is valid, although but seven per cent interest is allowed by the laws of the former State. *Miller* v. *Tiffany,* 1 Wall. 310; *Depeau* v. *Humphry,* 20 How. 1; *Chapman* v. *Robertson,* 6 Paige, 634; *Andrews* v. *Pond,* 13 Pet. 65.

Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance. *Nelson* v. *First Nat. Bank,* 48 Ill. 39; *Mason* v. *Dousay,* 35 id. 424; *Jones* v. *Bank,* 34 id. 319.

Unless forbidden by statute, it is the rule of law generally, that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. *Wynne* v. *Raikes,* 5 East, 514; *Bank of Ireland* v. *Archer,* 11 M. & W. 383; *How* v. *Loring,* 24 Pick. 254; *Ward* v. *Allen,* 2 Met. 53; *Bank* v. *Woodruff,* 34 Vt. 92; *Spalding* v. *Andrews,* 12 Wright, 411; *Williams* v. *Winans,* 2 Green (N. J.), 309; *Storer* v. *Logan,* 9 Mass. 56; Byles on Bills, sect. 149; *Barney* v. *Withington,* 37 N. Y. 112. See the Illinois cases cited, *supra.*

Says Lord Ellenborough, in the first of these cases, "A promise to accept an existing bill is an acceptance. A promise to pay it is also an acceptance. A promise, therefore, to do the one or the other,—i. e., to accept or certainly pay,—cannot be less than an acceptance."

In *Williams* v. *Winans,* Hornblower, C. J., says, "The first question is, whether a parol acceptance of a bill will bind the acceptor; and of this there is at this day no room to doubt. The defendant was informed of the sale, and that his son had drawn an order on him for $125; to which he answered, it was all right. He afterwards found the interest partly paid, and the evidence of payment indorsed upon it in the handwriting of the defendant. These circumstances were proper and legal evidence from which the jury might infer an acceptance."

It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise, upon a valuable consideration; and the promisor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill with interest. *Townley* v. *Sumdel,* 2 Pet. 170; *Boyce* v. *Edwards,* 4 id. 111; *Goodrich* v. *Gordon,* 15 Johns. 6; *Scott* v. *Pilkinton,* 15 Abb. Pr. 280; *Ontario Bank* v. *Worthington,* 12 Wend. 593; *Bissell* v. *Lewis,* 4 Mich. 450; *Williams* v. *Winans, supra.*

These principles settle the present case against the appellants.

It certainly does not aid their case, that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm (while, in fact, the produce was shipped to and received and sold by them), and that the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and, by a subsequent telegram, should have directed them not to pay it.

The judgment must be affirmed.

LIVERPOOL STEAM CO. v. PHENIX INS. CO., 129 U. S. 397, (1888)

Mr. Justice Gray delivered the opinion of the court.

This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, "in a cause of action arising from breach of contract," brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the Montana, one of the appellant's steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead Bay on the coast of Wales, before reaching her destination.

In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officers; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libellant had not been subrogated to the rights of the owners of the goods.

It is to be remembered that the jurisdiction of this court to review the decree below is limited to questions of law, and does not extend to questions of fact. Act of February 16, 1875, c. 77, § 1; 18 Stat. 315; *The Gazelle,* 128 U. S. 474, 484, and cases there cited.

In the findings of fact, the Circuit Court, after stating, in much detail, the course of the ship's voyage, the conduct of her master and officers, the position and character of the various lighthouses and other safeguards which she passed, and other attendant circumstances immediately preceding the stranding, distinctly finds as facts: "Those in charge of the navigation of the Montana were negligent, in that, without having taken cross bearings of the light at South Stack, and so determined their distance from the light, they took an east three-quarters south course before passing the Skerries, and without seeing the Skerries light; and in that they continued at full speed after hearing the fog-gun at North Stack; and in that they took a northeast by east magnetic course on hearing said fog-gun, instead of stopping and backing and taking a westerly course out of Holyhead Bay; and in that they did not ascertain their position in Holyhead Bay by means of the lights and fog-signals, or by the use of the lead, or by stopping until they should, by those means or otherwise, learn where their ship was."

"On the foregoing facts," the only conclusion of law stated by the Circuit Court (except those affecting the right of subrogation and the amount to be recovered) is in these words: "The stranding of the Montana and the consequent damage to her cargo having been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor." Negligence is not here stated as a conclusion of law, but assumed as a fact already found. The conclusion of law is, in effect, that, such being the fact, the respondent is liable, notwithstanding any clause in the bills of lading.

The question of negligence is fully and satisfactorily discussed in the opinion of the District Court, reported in 17 Fed. Rep. 377, and in that of the Circuit Court, reported in 22 Blatchford, 372. It is largely, if not wholly, a question of fact, the decision of which by the Circuit Court cannot be reviewed here; and so far as it can possibly be held to be or to involve a question of law, it is sufficient to say that the circumstances of the case, as found by the Circuit Court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship.

The contention that the appellant is not a common carrier may also be shortly disposed of.

By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. Molloy, bk. 2, c. 2, § 2; Bac. Ab. Carrier, A; *Barclay* v. *Cuculla y Gana,* 3 Doug. 389; 2 Kent Com. 598, 599; Story on Bailments, § 501; *The Niagara,* 21 How. 7, 23; *The Lady Pike,* 21 Wall. 1, 14.

In the present case, the Circuit Court has found as facts:

"The Montana was an ocean steamer, built of iron, and performed regular service as a common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the Guion Line. By her, and by other ships in that line, the respondent was such common carrier. On March 2, 1880, the Montana left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers." The bills of lading, annexed to the answer and to the findings of fact, show that the four shipments in question amounted to less than one hundred and thirty tons, or hardly more than one-twentieth part of the whole cargo. It is clear, therefore, upon this record, that the appellant is a common carrier, and liable as such, unless exempted by some clause in the bills of lading.

In each of the bills of lading, the excepted perils, for loss or damage from which it is stipulated that the appellant shall not be responsible, include "barratry of master or mariners," and all perils of the seas, rivers or navigation, described more particularly in one of the bills of lading as "collision, stranding or other peril of the seas, rivers or navigation, of whatever nature or kind soever, and howsoever such collision, stranding or other peril may be caused," and in the other three bills of lading described more generally as any "accidents of the seas, rivers and steam navigation, of whatever nature or kind soever;" and each bill of lading adds, in the following words in the one, and in equivalent words in the others, "whether arising from the negligence, default, or error in judgment of the master, mariners, engineers or others of the crew, or otherwise, howsoever."

If the bills of lading had not contained the clause last quoted, it is quite clear that the other clauses would not have relieved the appellant from liability for the damage to the goods from the stranding of the ship through the negligence of her officers. Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. *General Ins. Co.* v. *Sherwood,* 14 How. 351, 364, 365; *Orient Ins. Co.* v. *Adams,* 123 U. S. 67, 73; *Copeland* v. *New England Ins. Co.,* 2 Met. 432, 448-450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed. *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344; *Express Co.* v. *Kountze,* 8 Wall. 341; *Transportation Co.* v. *Downer,* 11 Wall. 129; *Grill* v. *General Iron Screw Co.,* L. R. 1 C P. 600, and L. R. 3 C. P. 476; *The Xantho,* 12 App. Cas. 503, 510, 515.

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship.

The question appears to us to be substantially determined by the judgment of this court in *Railroad Co.* v. *Lockwood,* 17 Wall. 357.

That case, indeed, differed in its facts from the case at bar. It was an action brought against a railroad corporation by a drover who, while being carried with his cattle on one of its trains under an agreement which it had required him to sign, and by which he was to pay certain rates for the carriage of the cattle, to pass free himself, and to take the risks of all injuries to himself or to them, was injured by the negligence of the defendant or its servants.

The judgment for the plaintiff, however, was not rested upon the form of the agreement, or upon any difference between railroad corporations and other carriers, or between carriers by land and carriers by sea, or between carriers of passengers and carriers of goods, but upon the broad ground that no public carrier is permitted by law to stipulate for an exemption from the consequences of the negligence of himself or his servants.

The very question there at issue, defined at the beginning of the opinion as "whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage," was stated a little further on in more general terms as "the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence;" and a negative answer to the question thus stated was a necessary link in the logical chain of conclusions announced at the end of the opinion as constituting the *ratio decidendi.* 17 Wall. 359, 363, 384.

The course of reasoning, supported by elaborate argument and illustration, and by copious references to authorities, by which those conclusions were reached, may be summed up as follows:

By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many States of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English Railway and Canal Traffic Act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law.

The only important modification by the Congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship-owners, (Act of March 3, 1851, c. 43; 9 Stat. 635; Rev. Stat. §§ 4282-4289,) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of their master and crew.

The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests.

Even if the extent of these responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character.

The fundamental principle, upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers, by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment.

Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business.

Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment.

It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence.

This analysis of the opinion in *Railroad Co.* v. *Lockwood* shows that it affirms and rests upon the doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several cases. *Express Co.* v. *Caldwell,* 21 Wall. 264, 268; *Railroad Co.* v. *Pratt,* 22 Wall. 123, 134; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, 183; *Railway Co.* v. *Stevens,* 95 U. S. 655; *Hart* v. *Pennsylvania Railroad,* 112 U. S. 331, 338; *Phoenix Ins. Co.,* v. *Erie Transportation Co.,* 117 U. S. 312, 322; *Inman* v. *South Carolina Railway, ante,* 128.

The general doctrine is nowhere stated more explicitly than in *Hart* v. *Pennsylvania Railroad* and *Phoenix Ins. Co.* v. *Erie Transportation Co.,* just cited; and there does not appear to us to be anything in the decision or opinion in either of those cases which supports the appellant's position.

In the one case, a contract fairly made between a railroad company and the owner of the goods, and signed by the latter, by which he was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as just and reasonable, because a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the compensation which he received, and of protecting himself against extravagant or fanciful valuations—which is quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants.

In the other, the decision was that, as a common carrier might lawfully obtain from a third person insurance on the goods carried against loss by the usual perils, though occasioned by negligence of the carrier's servants, a stipulation in a bill of lading that the carrier, when liable for the loss, should have the benefit of any insurance effected on the goods, was valid as between the carrier and the shipper, even when the negligence of the carrier's servants was the cause of the loss. Upholding an agreement by which the carrier receives the benefit of any insurance obtained by the shipper from a third person is quite different from permitting the carrier to compel the shipper to obtain insurance, or to stand his own insurer, against negligence on the part of the carrier.

It was argued for the appellant, that the law of New York, the *lex loci contractus,* was settled by recent decisions of the Court of Appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. *Mynard* v. *Syracuse Railroad,* 71 N. Y. 180; *Spinetti* v. *Atlas Steamship Co.,* 80 N. Y. 71.

But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State. *Railroad Co.* v. *Lockwood,* 17 Wall. 357, 368; *Myrick* v. *Michigan Central Railroad,* 107 U. S. 102; *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495, 511; *Swift* v. *Tyson*, 16 Pet. 1; *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Smith* v. *Alabama*, 124 U. S. 365, 478; *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 583. The decisions of the State courts certainly cannot be allowed any greater weight in the Federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States.

It was also argued in behalf of the appellant, that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers.

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts and opinions of commentators in France, Italy, Germany, and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pardessus Droit Commercial, no. 542; 4 Goujet & Meyer Dict. Droit Commercial (2d ed.) Voiturier, nos. 1, 81; 2 Troplong Droit Civil, nos. 894, 910, 942, and other books cited in *Peninsular & Oriental Co.* v. *Shand*, 3 Moore P. C. (N. S.) 272, 278, 285, 286; 25 Laurent Droit Civil Français, no. 532; Mellish, L. J., in *Cohen* v. *Southeastern Railway*, 2 Ex. D. 253, 257.

Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever been adopted in the United States or in England, or recognized in the admiralty courts of either. *The Lottawanna*, 21 Wall. 558; *The Scotland*, 105 U. S. 24, 29, 33; *The Belgenland*, 114 U. S. 355, 369; *The Harrisburg*, 119, U. S. 199;

The Hamburg, 2 Moore P. C. (N. S.) 289, 319; *S. C.* Brown. & Lush. 253, 272; *Lloyd* v. *Guibert,* L. R. 1 Q. B. 115, 123, 124; *S. C.* 6 B. & S. 100, 134, 136; *The Gaetano & Maria,* 7 P. D. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board of a British vessel and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid.

The Circuit Court declined to yield to this argument, upon two grounds: 1st. That as the answer expressly admitted the jurisdiction of the Circuit Court asserted in the libel, and the law of Great Britain had not been set up in the answer nor proved as a fact, the case must be decided according to the law of the Federal courts, as a question of general commercial law. 2d. That there was nothing in the contracts of affreightment to indicate a contracting in view of any other law than the recognized law of such forum in the United States as should have cognizance of suits on the contracts. 22 Blatchford, 397.

The law of Great Britain, since the Declaration or Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved.

The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. *Church* v. *Hubbart,* 2 Cranch, 187, 236; *Ennis* v. *Smith,* 14 How. 400, 426, 427; *Dainese* v. *Hale,* 91 U. S. 13, 20, 21; *Pierce* v. *Indseth,* 106 U. S. 546; *Ex parte Cridland,* 3 Ves. & B. 94, 99; *Lloyd* v. *Guibert,* L. R. 1 Q. B. 115, 129; *S. C.* 6 B. & S. 100, 142. In the case last cited, Mr. Justice Willes, delivering judgment in the Exchequer Chamber, said: "In order to preclude all misapprehension, it may be well to add, that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law wthout judicial proof, must proceed according to the law of England."

The decision in *Lamar* v. *Micou,* 112 U. S. 452, and 114 U. S. 218, did not in the least qualify this rule, but only applied the settled doctrine that the Circuit Courts of the United States, and this court on appeal from their decisions, take judicial notice of the laws of the several States of the Union as domestic laws; and it has since been adjudged, in accordance with the general rule as to foreign law, that this court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley* v. *Donohue,* 116 U. S. 1; *Renaud* v. *Abbott,* 116 U. S. 277, 285.

The rule is as well established in courts of admiralty as in courts of common law or courts of equity. Chief Justice Marshall, delivering judgment in the earliest admiralty appeal in which he took part, said: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." *Talbot* v. *Seeman,* 1 Cranch, 1, 38. And in a recent case in admiralty, Mr. Justice Bradley said: "If a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same." *The Scotland,* 105 U. S. 24, 29.

So Sir William Scott, in the High Court of Admiralty, said: "Upon all principles of common jurisprudence, foreign law is always to be proved as a fact." *The Louis,* 2 Dodson, 210, 241. To the same effect are the judgments of the Judicial Committee of the Privy Council in *The Prince George,* 4 Moore P. C. 21, and

The Peerless, 13 Moore P. C. 484. And in a more recent case, cited by the appellant, Sir Robert Phillimore, said: "I have no doubt whatever that those who rely upon the difference between the foreign law and the law of the forum in which the case is brought are bound to establish that difference by competent evidence." *The Duero,* L. R. 2 Ad. & Ec. 393, 397.

It was, therefore, rightly held by the Circuit Court, upon the pleadings and proofs upon which the case had been argued, that the question whether the British law differed from our own was not open.

But it appears by the supplemental record, certified to this court in obedience to a writ of *certiorari,* that after the Circuit Court had delivered its opinion and filed its findings of fact and conclusions of law, and before the entry of a final decree, the appellant moved for leave to amend the answer by averring the existence of the British law and its applicability to this case, and to prove that law; and that the motion was denied by the Circuit Court, because the proposed allegation did not set up any fact unknown to the appellant at the time of filing the original answer, and could not be allowed under the rules of that court. 22 Blatchford, 402-404.

On such a question we should be slow to overrule a decision of the Circuit Court. But we are not prepared to say that if, upon full consideration, justice should appear to require it, we might not do so, and order the case to be remanded to that court with directions to allow the answer to be amended and proof of the foreign law to be introduced. *The Adeline,* 9 Cranch, 244, 284; *The Marianna Flora,* 11 Wheat. 1, 38; *The Charles Morgan,* 115 U. S. 69; *Merchants' Ins. Co.* v. *Allen,* 121 U. S. 67; *The Gazelle,* 128 U. S. 474. And the question of the effect which the law of Great Britain, if duly alleged and proved, should have upon this case has been fully and ably argued.

Under these circumstances, we prefer not to rest our judgment upon technical grounds of pleading or evidence, but, taking the same course as in *Merchants Ins. Co.* v. *Allen,* just cited, proceed to consider the question of the effect of the proof offered, if admitted.

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. *The Ducro,* L. R. 2 Ad. & Ec. 393; *Taubman* v. *Pacific Co.,* 26 Law Times (N. S.) 704; *Steel* v. *State Line Steamship Co.,* 3 App. Cas. 72; *Manchester &c. Railway* v. *Brown,* 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain.

The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the Declaration of Independence by Lord Mansfield (as reported by Sir William Blackstone, who had been of counsel in the case) as follows: "The general rule, established *ex comitate et jure gentium,* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom." *Robinson* v. *Bland,* 1 W. Bl. 234, 256, 258; *S. C.* 2 Bur. 1077, 1078.

The recent decisions by eminent English judges, cited at the bar, so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In *Peninsular & Oriental Co.* v. *Shand,* 3 Moore P. C. (N. S.) 272, 290, Lord Justice Turner, delivering judgment in the Privy Council, reversing a decision of the Supreme Court of Mauritius, said, "The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure,* and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."

It was accordingly held, that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him hence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. 3 Moore P. C. (N.S.) 278.

Lord Justice Turner observed, that it was a satisfaction to find that the Court of Cassation in France had pronounced a judgment to the same effect, under precisely simliar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red Sea, owing to the negligence of her master and crew. *Julien* v. *Peninsular & Oriental Co.,* imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais (1864) 225.

The case of *Lloyd* v. *Guibert,* 6 B. & S. 100; *S. C.* L. R. 1. Q. B. 115; decided in the Queen's Bench before, and in the Exchequer Chamber after, the decision in the Privy Council just referred to, presented this peculiar state of facts: A French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc in Hayti to Havre, London or Liverpool, at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English Court of Admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held, that the French law governed the case, and therefore the plaintiff could not recover.

It thus appears that in that case the question of the intent of the parties was complicated with that of the lawful authority of the master; and the decision in the Queen's Bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight or the owners was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 B. & S. 100. That decision was in accordance with an earlier one of Mr. Justice Story, in *Pope* v. *Nickerson,* 3 Story, 465; as well as with later ones in the Privy Council, on appeal from the High Court of Admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. *The Karnak,* L. R. 2 P. C. 505, 512; *The Gaetano & Maria,* 7 P. D. 137. See also *The Woodland,* 7 Benedict, 110, 118; 14 Blatchford, 499, 503, and 104 U. S. 180.

The judgment in the Exchequer Chamber in *Lloyd* v. *Guibert* was put upon somewhat broader ground. Mr. Justice Willes, in delivering that judgment, said: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R. 1 Q. B. 122, 123; 6 B. & S. 133.

It was accordingly held, conformably to the judgment in *Peninsular & Oriental Co.* v. *Shand*, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R. 1 Q. B. 125, 126; 6 B. & S. 137. It was then observed that the law of Portugal, in force where the bottomry bond was given, could not affect the case; that the law of Hayti had not been mentioned or relied upon in argument; and that "in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and further, that the first act done towards performance was weighing anchor in a Danish port;" and it was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue.

The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England, by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading, (a place where both parties would also be foreigners,) partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.

In two later cases, in each of which the judgment of the Queen's Bench Division was affirmed by the Court of Appeal, the law of the place where the contract was made was held to govern, notwithstanding some of the facts strongly pointed towards the application of another law; in the one case, to the law of the ship's flag; and in the other, to the law of the port where that part of the contract was to be performed, for the nonperformance of which the suit was brought.

In the first case, a bill of lading, issued in England in the English language to an English subject, by a company described therein as an English company and in fact registered both in England and in Holland, for goods shipped at Singapore, an English port, to be carried to a port in Java, a Dutch possession, in a vessel with a Dutch name, registered in Holland, commanded by a Dutch master and carrying the Dutch flag, in order to obtain the privilege of trading with Java, was held to be governed by the law of England, and not by that of Holland, in determining the validity and construction of a clause exempting the company from liability for negligence of master and crew; and Lords Justices Brett and Lindley both considered it immaterial whether the ship was regarded as English or Dutch. *Chartered Bank of India* v. *Netherlands Steam Navigation Co.*, 9 Q. B. D. 118, and 10 Q. B. D. 521, 529, 536, 540, 544.

As Lord Justice Lindley observed: "This conclusion is not at all at variance with *Lloyd* v. *Guibert*, but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test; and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English, the defendant French; the *lex loci contractus* was Danish; the ship was French; her master was French, and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from them. The *lex loci contractus* was here English, and ought to prevail unless there is some good ground to the contrary. So far from there being such ground, the inference is very strong that the parties really intended to contract with reference to English law." 10 Q. B. D. 540.

In the remaining English case, a contract made in London between two English mercantile houses, by which one agreed to sell to the other 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board vessels furnished by the purchasers at London, and to be paid for by them in London on arrival, was held to be an English contract, governed by English law; notwithstanding that the shipment of the goods in Algiers had been prevented by *vis major*, which, by the law of France in force there, excused the seller from performing the contract. *Jacobs* v. *Credit Lyonnais*, 12 Q. B. D. 589.

That result was reached by applying the general rule, expressed by Denman, J., in these words: "The general rule is, that where a contract is made in England between merchants carrying on business here, as this is, but to be performed elsewhere, the construction of the contract, and all its incidents, are to be governed by the law of the country where the contract is made, unless there is something to show that the intention of the parties was that the law of the country where the contract is to be performed should prevail;" and summed up by the Court of Appeal, consisting of Brett, M. R., and Bowen, L. J., as follows: "The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties." 12 Q. B. D. 596, 597, 600.

This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view. *Cox* v. *United States,* 6 Pet. 172; *Scudder* v. *Union Bank,* 91 U. S. 406; *Pritchard* v. *Norton,* 106 U. S. 124; *Lamar* v. *Micou,* 114 U. S. 218; *Watts* v. *Camors,* 115 U. S. 353, 362.

The opinion in *Watts* v. *Camors,* just cited, may require a word or two of explanation. It was there contested whether, in a charter party made at New Orleans between an English owner and an American charterer of an English ship for a voyage from New Orleans to a port on the continent of Europe, a clause regulating the amount payable in case of any breach of the contract was to be considered as liquidating the damages, or as a penalty only. Such was the question of which the court said that if it depended upon the intent of the parties, and consequently upon the law which they must be presumed to have had in view, they "must be presumed to look to the general maritime law of the two countries, and not to the local law of the State in which the contract is signed." The choice there was not between the American law and the English law, but between the statutes and decisions of the State of Louisiana, and a rule of the maritime law common to the United States and England.

Some reliance was placed by the appellant upon the following observations of Mr. Justice Story, sitting in the Circuit Court:

"If a contract is to be performed, partly in one country and partly in another country, it admits of a double aspect, nay, it has a double operation, and is, as to the particular parts, to be interpreted distinctively; that is, according to the laws of the country where the particular parts are to be performed or executed. This would be clearly seen in the case of a bill of lading of goods, deliverable in portions or parts at ports in different countries. Indeed, in cases of contracts of affreightment and shipment, it must often happen that the contract looks to different portions of it to be performed in different countries; some portions at the home port, some at the foreign port, and some at the return port." "The goods here were deliverable in Philadelphia; and what would be an effectual delivery thereof, in the sense of the law, (which is sometimes a nice question,) would, beyond question, be settled by the law of Pennsylvania. But to what extent the owners of the schooner are liable to the shippers for a non-fulfilment of a contract of shipment of the master—whether they incur an absolute or a limited liability, must depend upon the nature and extent of the authority which the owners gave him, and this is to be measured by the law of Massachusetts," where the ship and her owners belonged. *Pope* v. *Nickerson,* 3 Story, 465, 484, 485.

But in that case the last point stated was the only one in judgment; and the previous remarks evidently had regard to such distinct obligations included in the contract of affreightment as are to be performed in a particular port—for instance, what would be an effectual delivery, so as to terminate the liability of the carrier, which, in the absence of express stipulation on that subject, is ordinarily governed by the law or usage of the port of discharge. *Robertson* v. *Jackson,* 2 C. B. 412; *Lloyd* v. *Guibert,* L. R. 1 Q. B. 115, 126; *S. C.* 6 B. & S. 100, 137.

In *Morgan* v. *New Orleans &c. Railroad,* 2 Woods, 244, a contract made in New York, by a person residing there, with a railroad corporation having its principal office there but deriving its powers from the laws of other states, for the conveyance of interests in railroads and steamboat lines, the delivery of property and the building of a railroad in those states, and which, therefore, might be performed partly in New York, and must be performed partly in the other states, was held by Mr. Justice Bradley, so far as concerned the right of one party to have the contract rescinded on account of nonperformance by the other party, to be governed by the law of New York, and not by either of the diverse laws of the other states in which parts of the contract were to be performed.

In *Hale* v. *New Jersey Steam Navigation Co.*, 15 Conn. 538, 546, goods were shipped at New York for Providence in Rhode Island or Boston in Massachusetts, on a steamboat employed in the business of transportation between New York and Providence; and an exemption, claimed by the carrier under a public notice, was disallowed by the Supreme Court of Connecticut, because by the then law of New York the liability of a common carrier could not be limited by such a notice. Chief Justice Williams, delivering judgment, said: "The question is, by what law is this contract to be governed. The rule upon that subject is well settled, and has been often recognized by this court, that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the laws of some other state. There is nothing in this case, either from the location of the parties or the nature of the contract, which shows that they could have had any other law in view than that of the place where it was made. Indeed, as the goods were shipped to be transported to Boston or Providence, there would be the most entire uncertainty what was to be the law of the case if any other rule was to prevail. We have, therefore, no doubt that the law of New York, as to the duties and obligations of common carriers, is to be the law of the case."

In *Dyke* v. *Erie Railway,* 45 N. Y. 113, 117, a passenger travelling upon a ticket by which a railroad corporation, established in New York, and whose road extended from one place to another in that state, passing through the States of Pennsylvania and New Jersey by their permission, agreed to carry him from one to another place in New York, was injured in Pennsylvania, by the law of which the damages in actions against railroads for personal injury were limited to $3000. The Court of Appeals of New York held that the law of Pennsylvania had no application to the case; and Mr. Justice Allen, delivering the opinion, referred to the case of *Peninsular & Oriental Co.* v. *Shand,* before cited, as analogous in principle, and said: "The contract was single and the performance one continuous act. The defendant did not undertake for one specific act, in part performance, in one state, and another specific and distinct act in another of the states named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was a part of the single act of transportation from Attica or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this state, and which was indivisible. The obligation was created here, and by force of the laws of this state, and force and effect must be given to it in conformity to the laws of New York. The performance was to commence in New York, and to be fully completed in the same state, but liable to breach, partial or entire, in the States of Pennsylvania and New Jersey, through which the road of the defendant passed; but whether the contract was broken, and if broken the consequences of the breach, should be determined by the laws of this state. It cannot be assumed that the parties intended to subject the contract to the laws of the other states, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those states and the *lex loci contractus.*"

In *McDaniel* v. *Chicago & Northwestern Railway,* 24 Iowa, 412, 417, cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derailing of trains, were injured in Illinois by the negligence of the company's servants; and the Supreme Court of Iowa, Chief Justice Dillon presiding, held the case to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of the contract. The court said: "The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made."

So in *Pennsylvania Co.* v. *Fairchild,* 69 Illinois, 260, where a railroad company received in Indiana goods consigned to Leavenworth, in Kansas, and carried them to Chicago in Illinois, and there delivered them to another railroad company, in whose custody they were destroyed by fire, the Supreme Court of Illinois held that the case must be governed by the law of Indiana, by which the first company was not liable for the loss of the goods after they passed into the custody of the next carrier in the line of transit.

The other cases in the courts of the several states, cited at the bar, afford no certain or satisfactory guide. Two cases, held not to be governed by a statute of Pennsylvania providing that no railroad corporation should be liable for a loss of passenger's baggage beyond $300, unless the excess in value was disclosed and paid for, were decided (whether rightly or not we need not consider) without much reference to authority, and upon their peculiar circumstances—the one case, on the ground that a contract by a New Jersey corporation to carry a passenger and his baggage from a wharf in Philadelphia across the Delaware River, in which the States of Pennsylvania and New Jersey had equal rights of navigation and passage, and thence through the State of New Jersey to Atlantic City, was a contract to be performed in New Jersey and governed by the law of that state; *Brown* v. *Camden & Atlantic Railroad,* 83 Penn. St. 316; and the other case, on the ground that the baggage, received at a town in Pennsylvania to be carried to New York city, having been lost after its arrival by negligence on the part of the railroad company, the contract, so far as concerned the delivery, was to be governed by the law of New York. *Curtis* v. *Delaware & Lackawanna Railroad,* 74 N. Y. 116. The suggestion in *Barter* v. *Wheeler,* 49 N. H. 9, 29, that the question, whether the liability of a railroad corporation for goods transported through parts of two states was that of a common carrier or of a forwarder only, should be governed by the law of the state in which the loss happened, was not necessary to the decision, and appears to be based on a strained inference from the observations of Mr. Justice Story in *Pope* v. *Nickerson,* above cited. In a later case, the Supreme Court of New Hampshire reserved any expression of opinion upon a like question. *Gray* v. *Jackson,* 51 N. H. 9, 39.

This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

There does not appear to us to be anything in either of the bills of lading in the present case, tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made.

The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called Montana, now lying in the port of New York and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford St." No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to tranship the goods by any other steamer," would permit transhipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lowndes on General Average (3d ed.) Appendix Q.

The contract being made at New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. *Peninsular & Oriental Co.* v. *Shand, Lloyd* v. *Guibert,* and *Chartered Bank of India* v. *Netherlands Steam Navigation Co.,* before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville and Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville and Nashville Railroad and its connections as common carriers "terminates on delivery of the goods or property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering *at the time of shipment* a note in writing, expressing the nature and character of such merchandise, to the master, mate or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the *United States One Thousand Dollars.*'" Act of March 3, 1851, c. 43, § 7; 9 Stat. 636; Rev. Stat. § 4288.

It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in *Peninsular & Oriental Co.* v. *Shand* gives some color to the argument. 3 Moore P. C. (N. S.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made; and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American and not an English contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to public policy and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.

This conclusion is in accordance with the decision of Judge Brown in the District Court of the United States for the Southern District of New York in *The Brantford City,* 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice Chitty, sitting alone in the Chancery Division, made since this case was argued, and, so far as we are informed, not reported in the Law Reports, nor affirmed or considered by any of the higher courts of Great Britain. *In re Missouri Steamship Co.,* 58 Law Times (N. S.) 377.

The present case does not require us to determine what effect the courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England.

The question of the subrogation of the libellant to the rights of the shippers against the carrier presents no serious difficulty.

From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper. *The Potomac,* 105 U. S. 630, 634; *Phoenix Ins. Co.* v. *Erie Transportation Co.,* 117 U. S. 312, 321.

In the present case, the libellant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier. The rest of the insurance money was paid by the libellant before the argument in the District Court, and that amount might have been claimed by amendment, if not under the original libel. *The Charles Morgan,* 115 U. S. 69, 75; *The Gazelle,* 128 U. S. 474. The question of the right of the libellant to recover to the whole extent of the insurance so paid was litigated and included in the decree in the District Court, and in the Circuit Court on appeal; and no objection was made in either of those courts, or at the argument in this court, to any insufficiency of the libel in this particular.

The appellant does, however, object that the decree should not include the amount of the loss on the cotton shipped under through bills of lading from Nashville to Liverpool. This objection is grounded on a clause in those bills of lading, which is not found in the bill of lading of the bacon and hams shipped at New York; and on the adjudication in *Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, that a stipulation in a bill of lading, that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid as between the carrier and the shipper, and therefore limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier.

But it behooves a carrier setting up such a defence to show clearly that the insurance on the goods is one which by the terms of his contract he is entitled to the benefit of. *Inman* v. *South Carolina Railway, ante,* 128. The through bills of lading of the cotton are signed by an agent of the railroad companies and the steamship company, "severally, but not jointly," and contain, in separate columns, two entirely distinct sets of "terms and conditions," the first relating exclusively to the land carriage by the railroads and their connections, and the second to the ocean transportation by the steamship. The clause relied on, providing that in case of any loss or damage of the goods, whereby any legal liability shall be incurred, that company only shall be held answerable in whose actual custody the goods are at the time, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods," is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, plainly signifying an intention that this clause should not apply to the latter. It is quite clear, therefore, that the appellant has no right to claim the benefit of any insurance on the goods. See *Railroad Co.* v. *Androscoggin Mills,* 22 Wall. 594, 602.

The result of these considerations is that the decree of the Circuit Court is in all respects correct and must be

Affirmed.

STATUTE OF FRAUDS.

LEROUX v. BROWN, 74 ENG. COM. LAW 800, (1852).

ASSUMPSIT. The declaration stated, that, on the 1st of December, 1849, at Calais, in France, to wit, at Westminster, in the county of Middlesex, in consideration that the plaintiff, at the request of the defendant, then agreed with the defendant to enter into the service of the defendant as clerk and agent, and to serve the defendant in that capacity *for one year certain,* at certain wages, to wit, 100*l.* a year, to be paid by the defendant to the plaintiff by equal quarterly payments during his continuance in such service, the defendant then promised the plaintiff to receive him into his said service, and to retain and employ him in his said service, at the wages aforesaid: Averment that the plaintiff, confiding in the promise of the defendant, was then, and from thence continually had been, ready and willing to enter into the service of the defendant as aforesaid, and to serve the defendant, for the wages aforesaid: Breach, that, though the plaintiff afterwards, to wit, on the day and year aforesaid, requested the defendant to receive the plaintiff into the service of the defendant as aforesaid, and to retain and employ him in such service, at the wages aforesaid; yet the defendant, not regarding his promise, did not, nor would, at the time he was so requested as aforesaid, or at any other time, receive the plaintiff into his service as aforesaid, or retain or employ him, at such wages as aforesaid, or in any other way, but wholly neglected and refused so to do; whereby the plaintiff not only lost and was deprived of all the profits and emoluments which might and would otherwise have arisen and accrued to him from entering into the service of the defendant, but also lost and was deprived of the means and opportunity of being retained and employed by and in the service of divers other persons, and remained wholly out of service and unemployed for a long time, to wit, for the year then next following, and was and is otherwise greatly injured, &c.

Pleas,—first, non assumpsit,—secondly, that the plaintiff was not ready and willing to enter into the service of the defendant, and to serve him the defendant, for the wages in the declaration mentioned, in manner and form as in the declaration was alleged, —thirdly, that the plaintiff did not request the defendant to receive him, the plaintiff, into the service of him, the defendant, or to retain or employ him, the plaintiff, in such service, at the wages in the declaration mentioned, in manner and form as the plaintiff had above in the declaration alleged.

Upon each of these pleas issue was joined.

The cause was tried before Talfourd, J., at the second sitting in Middlesex, in Trinity Term last. It appeared that an oral agreement had been entered into at Calais, between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of 100*l.* per annum, to collect poultry and eggs in that neighborhood, for transmission to the defendant here,—the employment to commence at a future day, and to continue for one year certain.

Evidence was given on the part of the plaintiff to show, that, by the law of France, such an agreement is capable of being enforced, although not in writing.

For the defendant, it was insisted, that, notwithstanding the contract was made in France, when it was sought to enforce it in this country, it must be dealt with according to our law; and, being a contract not to be performed within a year, the statute of frauds, 29 Car. 2, c. 3, s. 4, required it to be in writing.

Under the direction of the learned judge, a verdict was entered for the plaintiff on the first issue,—leave being reserved to the defendant to move to enter a nonsuit or a verdict for him on that issue, if the court should be of opinion that the contract could not be enforced here.

Jervis, C. J.—I am of opinion that the rule to enter a nonsuit must be made absolute. There is no dispute as to the principle which ought to govern our decision. My Brother Allen admits, that, if the 4th section of the statute of frauds applies, not to the validity of the contract, but only to the procedure, the plaintiff cannot maintain this action, because there is no agreement, nor any memorandum or note thereof, in writing. On the other hand, it is not denied by Mr. Honyman,—who has argued this case in a manner for which the court is much indebted to him,—that, if the 4th section applies to the contract itself, or, as Boullenois expresses it, to the *solemnities* of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at the words of the 4th section of the statute of frauds, and contrasting them with those of the 1st, 3d, and 17th sections, this conclusion seems to me to be inevitable. The words of s. 4 are, "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." The statute, in this part of it, does not say, that, unless those requisites are complied with, *the contract shall be void,* but merely that *no action shall be brought upon it:* and, as was put with great force by Mr. Honyman, the alternative, "unless the agreement, *or* some memorandum or note thereof, shall be in writing,"—words which are satisfied if there be any written evidence of a previous agreement,—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing. This therefore may be a very good agreement though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice. This view seems to be supported by the authorities; because, unless we are to infer that the courts thought the agreement itself good, though not made in strict compliance with the statute, they could not consistently have held, as was held in the cases referred to by Sir Edward Sugden, that a writing subsequent to the contract, and addressed to a third person, was sufficient evidence of an agreement, within the statute. It seems, therefore, that both authority and practice are consistent with the words of the 4th section. The cases of Carrington v.

Roots, and Reade v. Lamb, however, have been pressed upon us as being inconsistent with this view. It is sufficient to say that the attention of the learned judges by whom those cases were decided, was not invited to the particular point now in question. What they were considering was, whether, for the purposes of those actions, there was any substantial difference between the 4th and 17th sections. It must be borne in mind that the meaning of those sections has been the subject of discussion on other occasions. In Crosby v. Wadsworth, 6 East, 602, Lord Ellenborough, speaking of the 4th section says,—"The statute does not expresslv and immediately vacate such contracts, if made by parol: it only precludes the bringing of actions to enforce them." Again, in Laythoarp v. Bryant, 2 N. C. 735, 3 Scott, 238, Tindal, C. J., and Bosanquet, J., say distinctly that the contract is good, and that the statute merely takes away the remedy, where there is no memorandum or note in writing. I therefore think we are correct in holding that the contract in this case is incapable of being enforced by an action in this country, because the 4th section of the 29 Car. 2, c. 3, relates only to the procedure, and not to the right and validity of the contract itself. As to what is said by Boullenois in the passage last cited by Brother Allen, it is to be observed that the learned author is there speaking of what pertains ad vinculum obligationis et solemnitatem, and not with reference to the mode of procedure. Upon these grounds, I am of opinion that this action cannot be maintained, and that the rule to enter a nonsuit must be made absolute.

MAULE J.—I am of the same opinion. The 4th section of the statute of frauds enacts that "no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." Now, this is an action brought upon a contract which was not to be performed within the space of one year from the making thereof, and there is no memorandum or note thereof in writing signed by the defendant or any lawfully authorized agent. The case, therefore, plainly falls within the distinct words of the statute. It is said that the 4th section is not applicable to this case, because the contract was made in France. This particular section does not in terms say that no such contract as before stated shall be of any force; it says, *no action shall be brought upon it.* In their literal sense, these words mean that no action shall be brought upon such an agreement in any court in which the British legislature has power to direct what shall and what shall not be done; in terms, therefore, it applies to something which is to take place where the law of England prevails. But we have been pressed with cases which it is said have decided that the words "no action shall be brought" in the 4th section, are equivalent to the words "no contract shall be allowed to be good"' which are found in another part of the statute. Suppose it had been so held, as a general and universal proposition, still I apprehend it would not be a legitimate mode of construing the 4th section, to substitute the equivalent words for those actually used. What we have to construe, is, not the equivalent words, but the words we find there. If the substituted words import the same thing, the substitution is unnecessary and idle: and, if those words are susceptible of a different construction from those actually used, that is a reason for dealing with the latter only. It may be, that, for some purposes, the words used in the 4th and 17th sections may be equivalent; but they clearly are not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we say, is, that they prohibit the courts of this country from enforcing a contract made under circumstances like the present,—just as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract. None of the authorities which have been referred to seem to me to be at all at variance with the conclusion at which we have arrived.

Talford, J.—I am of the same opinion. The argument of Mr. Honyman seems to me to be quite unanswerable. That drawn from Laythoarp v. Bryant and that class of cases in which it has been held that the 4th section of the statute of frauds is satisfied by a subsequent letter addressed to a third party, containing evidence of the terms of the contract, shows clearly that that section has reference to procedure only, and not to what are called by the jurists the rights and solemnities of the contract. Rule absolute.

TORTS.

DENNICK v. RAILROAD CO., 103 U. S. 11, (1880).

Error to the Circuit Court of the United States for the Northern District of New York.

The plaintiff brought suit in a State Court of New York against the Central Railroad Company of New Jersey, to recover damages for the death of her husband by an accident on the defendant's road. The company entered an appearance and removed the case into the Circuit Court of the United States, on the ground that the plaintiff was a citizen of New York and the defendant a corporation of New Jersey. The complaint filed in the Circuit Court alleges that the plaintiff was his widow, and her children were his next of kin; that she was administratrix of his estate, appointed by the proper court in New York; and that his death was caused by the negligence of the defendant. Damages in the sum of $15,000 were claimed.

The answer denied the negligence, but admitted that the death was caused by the train running off the track in New Jersey, that there were a widow and next of kin, and that the plaintiff had been appointed administratrix by the surrogate of Albany County, New York.

The parties waived a jury. The plaintiff introduced evidence tending to prove the negligence charged, whereupon the court ruled that for the death of her husband, which occurred in the State of New Jersey, she could not, under the special statute of that State, recover in the action. Judgment was rendered for the defendant. The plaintiff then sued out this writ of error.

Mr. Justice Miller, after stating the case, delivered the opinion of the court.

It is understood that the decision of the court below rested solely upon the proposition that the liability in a civil action for damages which, under he statute of New Jersey, is imposed upon a party, by whose wrongful act, neglect, or default death ensues, can be enforced by no one but an administrator, or other personal representative of the deceased, appointed by the authority of that State. And the soundness or unsoundness of this proposition is what we are called upon to decide.

It must be taken as established by the record that the accident by which the plaintiff's husband came to his death occurred in New Jersey, under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death.

It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury.

It is indeed a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right.

Wherever by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court of the

United States for the Northern District were competent to try such a case when the parties were properly before it. *Mostyn* v. *Fabrigas,* 1 Cowp. 161; *Rafael* v. *Verelst,* 2 W. Bl. 983, 1055; *McKenna* v. *Fisk,* 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See *Ex Parte Van Riper,* 20 Wend. (N. Y.) 614; *Lowry v. Inman,* 46 N. Y. 119; *Pickering* v. *Fisk,* 6 Vt. 102; *Railroad v. Sprayberry,* 8 Bax. (Tenn.) 341; *Great Western Railway Co.* v. *Miller,* 19 Mich. 305.

But it is said that, conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction.

The statute does not say this in terms. "Every such action shall be brought by and in the names of the personal representatives of such deceased person." It may be admitted that for the purpose of this case the words "personal representatives" mean the administrator.

The plaintiff is ,then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall *not* be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, "if they reside in the State of New Jersey"?

It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say that it depends on the appointment of an administrator within the State?

The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing that there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one State, suing in that character in the courts of another State, without any authority from the latter. It is the general rule that this cannot be done.

The suit here was brought by the administratrix in a court of the State which had appointed her, and of course no such objection could be made.

If, then, the defendant was liable to be sued in the courts of the State of New York on this cause of action, and the suit could only be brought by such personal representative of the deceased, and if the plaintiff is the personal representative, whom the courts of that State are bound to recognize, on what principle can her right to maintain the action be denied?

So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey statute.

But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey.

And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute.

Again: it is said that, by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his lifetime. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode, such as specific property devised to individuals, or the amount which by the legislation of most of the States is set apart to the family of the deceased, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law. There can be no doubt that an administrator, clothed with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay it over to some one who establishes a better right thereto, or that what he so recovers is held in trust for some one not claiming under him or under the will. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies in his fiduciary character which both statutes prescribe.

We are aware that *Woodward* v. *Michigan Southern & Northern Indiana Railroad Co.* (10 Ohio St. 121) asserts a different doctrine, and that it has been followed by *Richardson* v. *New York Central Railroad Co.*, 98 Mass. 85, and *McCarthy* v. *Chicago, Rock Island, & Pacific Railroad Co.*, 18 Kan. 46. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the Court of Appeals of New York, in the case of *Leonard, Administrator,* v. *The Columbia Steam Navigation Co.*, not yet reported, but of which we have been furnished with a certified copy.

The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of these statutes are new, and many of them unsettled. Each State court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action.

Judgment reversed with directions to award a new trial.

PROCEDURE.

DICEY CONFLICT OF LAWS, CHAP. 31.*

All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest the term "procedure" is to be taken in its widest sense, and includes (*inter alia*)—

(1) remedies and process;
(2) evidence;
(3) limitation of an action or other proceeding;
(4) set-off or counter-claim.

---

*This chapter is inserted by permission of the American Publisher of "Dicey on the Conflict of Laws."

COMMENT.

The principle that procedure is governed by the *lex fori* is of general application and universally admitted, but the Courts of any country can apply it only to proceedings which take place in, or at any rate under the law of, that country. In a body of Rules, therefore, such as those contained in this Digest, which state the principles enforced by an English Court, the maxim that procedure is governed by the *lex fori* means in effect that it is governed by the ordinary law of England, without any reference to any foreign law whatever. The maxim is in fact a negative rule; it lays down that the High Court, in common, it may be added, with every other English Court, pursues its ordinary practice and adheres to its ordinary methods of investigation whatever be the character of the parties, or the nature of the cause which is brought before it.

"A person," it has been said, "suing in this country, must take "the law as he finds it; he cannot, by virtue of any regulation in "his own country, enjoy greater advantages than other suitors "here, and he ought not therefore to be deprived of any superior "advantage which the law of this country may confer. He is to "have the same rights which all the subjects of this kingdom are "entitled to," and the foreign defendant, it may be added, is to have the advantages, if any, which the form of procedure in this country gives to every defendant.

Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case.

"The law on this point is well settled in this country, where "this distinction is properly taken, that whatever relates to the "remedy to be enforced must be determined by the *lex fori*,—the "law of the country to the tribunals of which the appeal is made," but that whatever relates to the rights of the parties must be determined by the proper law of the contract or other transaction on which their rights depend.

Our Rule is clear and well established. The difficulty of its application to a given case lies in discriminating between matters which belong to *procedure* and matters which affect the *substantive rights* of the parties. In the determination of this question two considerations must be borne in mind:—

First. English lawyers give the widest possible extension to the meaning of the term "procedure." The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice; it includes the whole law of evidence, as well as every rule in respect of the limitation of an action or of any other legal proceeding for the enforcement of a right, and hence it further includes the methods, *e. g.,* seizure of goods or arrest of person, by which a judgment may be enforced.

Secondly. Any rule of law which solely affects, not the *enforcement* of a right but the *nature* of the right itself, does not come under the head of procedure. Thus, if the law which governs, *e. g.,* the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it affects the rights of the parties to the contract, and not the remedy for the enforcement of such rights.

Hence any rule limiting the time within which an action may be brought, any *limitation* in the strict sense of that word, is a matter of procedure governed wholly by the *lex fori.* But a rule which after the lapse of a certain time extinguishes a right of action—a rule of *prescription* in the strict sense of that word—is not a matter of procedure, but a matter which touches a person's substantive rights, and is therefore governed, not by the *lex fori,* but by the law, whatever it may be, which governs the right in question. Thus if, in an action for a debt incurred in France, the defence is raised that the action is barred under French law by lapse of time, or that for want of some formality an action could not be brought for the debt in a French Court, the validity of the defence depends upon the real nature of the French law relied upon. If that law merely takes away the plaintiff's *remedy,* it has no effect in England. If, on the other hand, the French law extinguishes the plaintiff's *right* to be paid the debt, it affords a complete defence to an action in England.

To this it must be added that an English statutory enactment, which affects both a person's rights and the method of its enforcement, establishes a rule of procedure and therefore applies to an action in respect of a right acquired under foreign law. Hence the 4th Section of the Statute of Frauds, and the 4th Section of the Sale of Goods Act, 1893, which, whether affecting rights or not, certainly affect procedure, apply to actions on contracts made in a foreign country and governed by foreign law. Whence the conclusion follows that a contract though made abroad, which does not satisfy the provisions of the 4th section of the Statute of Frauds, or of the Sale of Goods Act, 1893, respectively, cannot be enforced in England.

With regard to the Illustrations to this Rule it must always be borne in mind that, as we are dealing with proceedings before an English Court, the *lex fori* is the same thing as the law of England.

ILLUSTRATIONS.

(*1*) *Remedies and Process.*

1. *A* brings an action against *X* to obtain specific performance of a contract made between *A* and *X* in and subject to the law of a foreign country. The contract is one of which *A* might, according to the law of that country (*lex loci contractus*), obtain specific performance, but it is not one for which specific performance can be granted according to the law of England (*lex fori*). *A* cannot maintain an action for specific performance.

2. *A* brings an action against *X* for breach of a contract made with *X* in Scotland as a member of a Scotch firm. According to the law of Scotland (*lex loci contractus*), *A* could not maintain an action against *X* until he had sued the firm, which he has not done. According to the law of England (*lex fori*), the right to bring an action against the member of a firm does not depend upon the firm having been first sued. *A* can maintain an action against *X*.

3. *A*, a Portuguese, at a time when arrest of a debtor on mesne process is allowable under the law of England (*lex fori*), but is not allowable under the law of Portugal (*lex loci con-*

tractus), brings an action against *X*, a Portuguese, for a debt contracted in Portugal. *A* has a right to arrest *X*.

4. *A* in Spain sells *X* goods of the value of £50. The contract is made by word of mouth, and there is no memorandum of it in writing. The contract is valid and enforceable according to Spanish law (*lex loci contractus*). A contract of this description is, under the Sale of Goods Act, 1893, s. 4 (*lex fori*), not enforceable by action. *A* cannot maintain an action against *X* for refusal to accept the goods.

(2) *Evidence.*

5. A brings an action against *X* to recover a debt incurred by *X* in and under the law of a foreign country (*lex loci contractus*). *A* tenders evidence of the debt which is admissible by the law of the foreign country, but is inadmissible by the law of England (*lex fori*). The evidence is inadmissible.

6. *A* brings an action against *X*, an Englishman, for breach of a promise of marriage made by *X* to *A*, a German woman, at Constantinople. *A* has not such corroborative evidence as is required by 32 & 33 Vict. cap. 68, s. 2 (*lex fori*). *A* cannot prove the promise or maintain the action.

7. *A*, a Frenchman, makes a contract in France with *X*, an Englishman, to serve him in France from a future date for a year certain. The contract is made by word of mouth, and there is no memorandum of it in writing. It is a contract valid by the law of France (*lex loci contractus*), for the breach of which an action might be brought in a French Court, but under the 4th section of the Satute of Frauds no action can be brought on such an agreement unless there is a memorandum thereof in writing. The enactment applies to procedure. *A* cannot maintain an action in England against *X* for breach of the contract.

(3) *Limitation.*

8. *X* contracts a debt to *A* in Scotland. The recovery of the debt is not barred by lapse of time, according to Scotch law (*lex loci contractus*), but it is barred by the English Limitation Act, 1623, 21 Jac. I. cap. 16 (*lex fori*). *A* cannot maintain an action against *X*.

9. *X* incurs a debt to *A* in France. The recovery of such a debt is barred by the French law of limitation (*lex loci contractus*), but is not barred by any English Statute of Limitation. *A* can maintain an action for the debt against *X*.

10. *A* in a Manx Court brings an action against *X* for a debt incurred by *X* to *A* in the Isle of Man. The action, not being brought within three years from the time when the cause of action arose, is barred by Manx law, and judgment is on that account given in favor of *X*. *A* then, within six years from the time when the debt is incurred, brings an action against *X* in England. This action is not barred by the English Limitation Act, 1623 (*lex fori*). *A* can maintain his action against *X*.

11. *X*, under a bond made in India, is bound to repay *A* £100. Specialty debts have, under the law of India (*lex loci contractus*), no higher legal value than simple contract debts, and under that law the remedy for both is barred by the lapse of three years. The period of limitation for actions on specialty debts is, under the law of England,—3 & 4 Will. IV. cap. 42, s. 3, (*lex fori*),—twenty years. *A*, ten years after the execution *of the* bond, brings an action in England upon it against *X*. *A* can maintain the action.

(4) *Set-off.*

12. *X* in 1855 contracts in Prussia with *A* for the carriage by *A* of goods by sea from Memel to London. *A* brings an action against *X* for the freight, and *X* under Prussian law (*lex loci contractus*), claims to set off money, due to him by way of damages from *A*, which could not at that date be made, according to the rules of English procedure (*lex fori*), the subject either of a set-off or a counter-claim. *X* is not allowed to set off, against the money due to *A*, the damages due from *A* to *X*.

Lex Fori not Applicable.

13. *A* brings an action on a contract made by word of mouth between *X* and *A* in and under the law of a foreign country. It is a kind of contract which under the law of England (*lex fori*) is valid though not made in writing, but under the law of the foreign country (*lex loci contractus*) is void if not made in writing. *A*

cannot maintain his action, *i. e.*, the validity of the contract is governed in England, not by the *lex fori*, but by the *lex loci contractus*.

14. *A* brings an action against *X* for breach of a contract made in a foreign country. It is proved that under the law of that country (*lex loci contractus*) the contract for want of a stamp is unenforceable. If the want of the stamp merely deprives *A* of his remedy in the foreign country, then he can maintain an action in England for breach of the contract, *i. e.*, the want of the stamp merely affects procedure which is governed by the *lex fori*. If the want of the stamp makes the contract void *ab inito*, then *A* cannot maintain an action in England, *i. e.*, the want of a stamp affects a matter of right and is governed by the *lex loci contractus*.

15. *X* commits an assault upon *A* in Jamaica. For some time after the assault is committed, *A* might, had *X* been in England, have maintained an action for it there against *X*. Before *X* returns to England the legislature of Jamaica passes an Act whereby *X* is in respect of the assault acquitted and indemnified against the Queen and all other persons, and the assault is declared to be lawful. *X* then returns to England, and *A* brings an action against X for the assault. *A* cannot maintain the action, *i. e.*, the character of the act done by *X*, or *A*'s right to treat it as a wrong, is governed, not by the *lex fori*, but by the *lex loci delicti commissi*.

INDEX.

ACCOUNTING:
    form of, governed by what law, 280.

ACKNOWLEDGMENT:
    sufficiency of, to legitimate, 239, 240 et seq.

ACTIONS:
    jurisdiction of transitory, 133.
    for injuries committed abroad, 133. 137, 138, 139, 140.
    for crimes committed abroad, 137-140, 160.
    for tresspass to real property, where brought, 149, 150.

ACTS:
    in uncivilized countries, 54-57.
    as evidence of domicil, 102.
    liability for, when committed abroad, 172, 173, 174-180.
    what, sufficient to change domicil, 84.

ADMINISTRATION:
    governed by what law, 291-294, 306-309.
    where taken out, 293.

ADMINISTRATORS:
    effect of payment to foreign, 293.
    relation of, of different states, 298.
    public, powers of, 301-304 et seq

ADOPTION:
    distinguished from "legitimation," 223.

AFFREIGHTMENT:
    contract of, by what law governed, 228.

AGENCY:
    power of alien enemies to create, 114.

ALIENS:
    rights of, 113-116.
    goods of, captured in war, 117-132.
    right of, to apply to our courts, 134-137.

ALIEN ENEMIES:
    powers and disabilities of, 111-132.
    goods of, captured in war, 117-132.

ALLEGIANCE:
    distinguished from "domicil," 33, 34, 40-43, 63.
    native, as governing reverter of domicil, 63.

ANGLO-INDIAN DOMICIL: (See Domicil).
    meaning of, 48, 52, 53.

ANIMUS MANENDI:
    as determining domicil, 124.
    as fixing national character, 124.

ANTE-NUPTIAL AGREEMENT:
- extra territorial effect of, 181-187.
- effect on movable and immovable property, 184, 185, 186, 187.
- effect on present or after-acquired property, 185, 187.

APPOINTMENTS:
- power of alien enemies to make, 114.

APPRENTICES:
- domicil of, 80-81.

ASSIGNMENT:
- governed by what law, 417,-420.

ATTACHMENT:
- what law governs, 420-447.

ATTORNEY:
- power of alien enemy to appoint, 114.

AUTHORITY:
- of alien enemy, to appoint attorney, 114.

BILLS OF EXCHANGE:
- governed by what law, 18.

BILLS OF LADING:
- what law governs, 465 et seq.

BOTTOMRY CONTRACTS:
- governed by what law, 288.

BRITISH SHIPS:
- torts committed on, where triable, 134.

BRITISH SUBJECTS:
- domicil of, 52.
- property of, seized in war, 117-132.

CAPACITY:
- of alien enemies to carry on business, 111-132.

CHATTELS PERSONAL: (See Personal Property).
- where taxable, 87 et seq.
- as governed by comity, 90.

CHILDREN:
- status of, 29, 38-43.
- domicil of, 73-76.
- domicil of legitimate, 23-43.
- domicil of illegitimate, 23-43, 224, 228.

CHOICE:
- domicil of, 23-43.

CHOICE OF LAW:
- need of, 9, 10.

CITIZENSHIP:
- as determining domicil, 63.
- how acquired, 104-110.
- acquired by marriage, 105-110.
- residence, as an essential of, 108-110.
- who has power to regulate, 104-110.

COLLISION OF LAW: 13. (See Private International Law).

COMITY:
- meaning of the term, 10, 11-15, 312, 313.
- as affecting personal property, 90.
- to what extent applied, in cases of guardianship, 264, 265.

COMMERCE:
  power of Congress over, 90.
COMMERCIAL DOMICIL:
  what is, 64-70.
  person's character determined by, 64, 65.
  nature of, 65.
  resemblance to civil domicil, 66.
  differences between civil and commercial, 66-70.
  need not coincide with civil, 70.
CONFLICT OF LAWS: (See Private International Law.)
  objections to this term, 13.
CONSTRUCTION:
  liberal, meaning of, 239.
CONTRACT:
  in uncivilized countries, 54, 55.
  governed by what law, 167-176, 288, 447-492.
  marriage as a, 201, 202.
  of affreightment, governed by what law, 288.
CORPORATIONS:
  property of, where taxed, 90, 91-93.
  power of foreign, to take real or personal property, 368, 369, 370-385.
  where foreign, may be sued, 386-399.
COURT:
  as guardian of orphan children, 263.
CRIMES:
  jurisdiction over, when committed abroad. 146, 147, 148.
  what are, 144, 145, 148.
DEBTS:
  situs of, 440-447.
DECLARATIONS:
  as evidence of domicil, 103.
DEPENDENT PERSONS:
  domicil of, 71-80, 81-87.
DIVORCE:
  state jurisdiction over, 190, 191, 192.
  extra-territorial effect of, 188-208.
  domicil, as determining jurisdiction over, 193-208.
  jurisdiction over the subject matter of, 195 et seq.
  jurisdiction, as to the parties, 195-208.
DOMICIL:
  origin of the term, 51.
  definition of, 21, 44.
  requisites of, 21, 45, 84.
  intention as an element of, 22, 30, 45, 46, 84.
  to effect a change of, 22, 23, 31, 33-48.
  voting as evidence of, 22, 86.
  kinds of, 30, 39, 43.
  of origin, 23-39-43.
  of choice, 23-39-43.
  power to change, 32.
  of legitimate children, 23-43.
  of illegitimate children, 23-43, 224, 228.
  singleness of, 35, 39, 51, 52, 63, 64.

DOMICIL—(Continued):
- how acquired, 35-43.
- how lost, 35-43.
- abandonment of, 36-43.
- evidence of, 37, 98-103.
- presumption as to, 45.
- reverter of, 32, 35, 36, 57-64.
- of Origin distinguished from choice, 34-43.
- of married women, 71-73.
- of infants, 73-76, 279.
- for purposes of taxation, 87 et seq.
- in uncivilized countries, 54-57.
- plurality of, 35, 51, 63, 64.
- allegiance as determining, 63.
- commercial, 64-70.
- law of determines disposition of property, 20-23, 61-64.
- time, as an element of determining, 26-36.
- of insane persons, 76-79.
- of paupers and convicts, 76-79.
- of Apprentices, 80-81.
- of Servants, 80-81.
- of Sailors, 81-84.
- of Students, 85-87.
- acts as evidence of, 102, 103.
- as governing Prize cases, 122-132.
- of officers, 40.
- of persons fleeing from creditors, 40.
- of invalids, 40.
- as giving jurisdiction in divorce, 192, 193-208.
- when wife may chose, 72, 73, 208 et seq.
- what act is sufficient to change, 84.
- how far, law of, governs powers of guardians, 254, 255, 264, 265. 278, 279.
- as governing personal property, 278.

EVIDENCE:
- what kind of, determines domicil, 102, 103.

EXPATRIATION:
- right of, 104-110.

EX-TERRITORIAL EFFECT OF LAWS: 15. (See Private International Law).

EX-TERRITORIAL OPERATION OF LAWS: 5. (See Private International Law).

EX-TERRITORIAL RECOGNITION OF RIGHTS: 5, 15. (See Private International Law).

FAMILY:
- what constitutes, 241, 242.

FOREIGN JUDGMENTS:
- extra-territorial effect of, 207-208.
- conclusiveness of, 218.

FOREIGN MARRIAGE:
- extra-territorial effect of, 177-180.
- property rights under, 181-187.
- validity of, 170-180.

FORM:
- of accounting governed by what law, 280.

GUARDIANS:
- powers of foreign, 253-255, 274.
- control of, over ward, 254, 255, 262, 263, 264, 265.
- control of, over wards' estate, 255, 265, 274.
- testamentary, powers of, 263, 264, 265, 280.
- war, as affecting duties of, 273.
- duties of, 273-286.
- liability of, 274-286.
- power to invest ward's property. 274, 275, 276-286, 289.
- natural, power of, 280, 281.
- difference between, and trustee, 281.

HABITANCY: (See Domicil).

HIGH SEAS:
- ships upon, where taxable, 91, 92.

HOME: (See Domicil).

IMMOVABLES:
- what law governs, 399-402.

INDEPENDENT PERSONS:
- domicil of, 80, 81.

INFANTS:
- domicil of, 73-76.
- guardians of, 253-255, 262, 263-265.
- power of, to change domicil, 279.

INSANE PERSONS:
- domicil of, 76, 77, 78, 79.

INTENTION:
- as an element of domicil, 22, 30, 45, 46, 84, 224, 228.

INTER-MUNICIPAL LAW: 15. (See Private International Law).

INTERNATIONAL LAW:
- as part of the general law, 17-19.
- foundation of, 17, 18.
- as governing mercantile questions, 18.
- enforcement of, 18, 19.
- derivation of, 39.
- defined, 311, 312.

INTERNATIONAL PRIVATE LAW: 15. (See Private International Law).

JUDICIAL NOTICE:
- Courts of United States bound to take, of what laws, 291.

JUDGMENTS:
- extra-territorial effect of, 207-208, 310-366, 315-366.
- how far conclusive. 218, 315-366.
- in rem, how far binding, 297, 315-366.
- in personam, how far binding, 297, 310-366.
- effect of foreign, in different countries, 353-366.

JURISDICTION:
- rule of, with reference to validity or dissolution of marriage, 99.
- over torts, committed abroad, 133-135.
- over penal laws, 140-165.
- of state, over marriage and divorce, 191-208.

LAW:
- meaning of, 3-7.
- "territorial" and "extra-territorial" distinguished, 3-5.
- of England, meaning of, 6, 7.

LAW OF NATIONS:
- definition of, 17.
- scope of, 18, 19.
- as part of the law of the land, 18.
- as governing mercantile questions, 18.
- as governing prize cases, 117-132.

LEGACY DUTY:
- where payable, 46-54.

LEGISLATURE:
- power of, 90, 225.
- legitimation as the creature of, 237, 238.

LEGITIMACY:
- marriage of parents as a method of, 220-240 et seq.
- what constitutes, 241-252.

LEGITIMATION:
- "adoption" distinguished from, 223.
- by subsequent marriage of parents, 224, 229, et seq.
- by decree of foreign sovereign, 235.
- what amounts to, 241-252.
- what acknowledgment, a sufficient, 239, 240 et seq.

LEX DOMICILII:
- as governing marriage, 215.

LEX FORI:
- how far not applicable, 508, 509.

LEX LOCI CONTRACTUS:
- as governing marriage, 215.

LEX SITUS:
- of personal property, 90, 97.

LICENSE:
- implied, in case of aliens, 113.

LOCAL LIMITS OF LAW: 15. (See Private International Law).

LOCALITY OF PROPERTY:
- for purposes of taxation, 97, 98.

LUNATICS:
- domicil of, 76-79.

MARRIAGE:
- effect of, as to legitimation, 28, 29-43.
- in uncivilized countries, 55.
- as a means of naturalization, 104-110.
- status of, 165-176.
- validity of, determined by what law, 168, 169.
- prohibition of, determined by what law, 168, 169.
- validity of, when celebrated abroad, 177-180.
- extra-territorial effect of, 177-180.
- as a status, 202-203.
- naturalization by, 225.

MARRIAGE SETTLEMENT:
- Extra-territorial effect of, 181-187.
- effect on property, 184-187.

MARRIED WOMEN:
- domicil of 71-73.
- when capable of choosing separate domicil, 72, 73, 208 et seq. 279.

MINORS:
  status of, 29, 38-43.
  domicil of, 73-76.
  domicil of legitimate, 23-43.
  domicil of illegitimate, 23-43, 224, 228.
MOVABLES:
  alienation of, in uncivilized countries, 56.
  as governed by owner's domicil, 90, 91.
  origin of the rule, that movables follow the owner's domicil, 90.
  where taxable, 97-98.
  what law governs, 402-416 et seq.
NATION:
  distinguished from "state," 16, 17.
NATIONAL DOMICIL: (See Domicil).
  what is, 63.
NATIONALITY:
  rules governing, 104-132.
  as conferred by marriage, 225.
NATURALIZATION:
  distinguished from domicil, 33, 34, 40-43.
  who has power to regulate, 104-132.
  marriage as a method of, 225.
NEUTRALS:
  property of, 123-132.
NOTICE:
  what sufficient, to give jurisdiction over divorce proceedings, 209.
NULLITY OF MARRIAGE:
  determined by what law, 167-169, 216, 217.
PENAL LAWS:
  what are, 140-165.
PEOPLE:
  distinguished from "nation," 16, 17.
PERSONAL PROPERTY:
  where taxable, 97, 98.
  as governed by comity, 90.
  governed by what law, 278, 305, 402-416 et seq.
POWER OF ATTORNEY:
  Power of alien to give, 114.
PRIVATE INTERNATIONAL LAW:
  accuracy of expression, 13.
  definition of, 3, 5, 311, 312.
  illustration of, 1, 2.
  meaning of term, 3-6.
  nature of subject, 1-16.
  names used as synonymous with, 13-16.
  as a part of all civilized systems of law, 11, 12.
  questions involved, 1, 2.
  development of, 7, 8.
  advantages of, 9, 10.
  objections to this term, 14, 15.
  origin of, 8.
PRIZE:
  property seized as, 117-132.
  as governed by law of nations, 117-132.

PROCEDURE:
- in uncivilized countries, 56-57.
- what the term includes, 503.
- what law governs, 504-509.
- remedies and process as belonging to, 506, 507.
- evidence as a part of, 507.
- Statutes of limitations, as within, 507, 508.
- set-off as governed by, 508.
- how far lex fori not applicable, 508, 509.

REAL PROPERTY:
- governed by what law, 220.
- trespass to, where action brought, 149, 150.

RESIDENCE: (See Domicil).
- what is a temporary, 40, 63.
- as determining domicil, 63, 64.
- as an element of domicil, 36-43, 44.
- as an essential of citizenship, 108-110.
- lawful, implies what, 113.
- necessity of, in order to obtain divorce, 198-208.

REVERTER OF DOMICIL: 32, 35, 36, 57-64. (See Domicil).

SAILORS:
- domicil of, 81-84.

SERVANTS:
- domicil of, 80-81.

SHIPS:
- domicil of, 91-93.

SINE ANIMO REVERTENDI:
- as determining national character, 125.

SITUS:
- of personal property, 90, 97, 98.
- of a debt, 440-447.

SOVEREIGNTY:
- meaning of, 16, 17.
- scope of, 17.
- division of, 17.
- as applied to states, 16.

STATE:
- defined, 16.
- kinds of, 16, 17.
- application of the term, 16, 17.
- "nation" compared with, 16.
- power of, to tax property within, 97.
- jurisdiction of, over marriage and divorce 191-208.

STATUS:
- effect of marriage on, 28-43.
- political, 38-43.
- civil, 38-43.
- as regulated by domicil, 99, 217, 278.
- civil, derived by marriage, 167,-176.
- marriage considered as a, 201, 202, 203.
- to what extent, recognized abroad, 217.

STATUTES:
- penal, 140-165.

STATUTE OF FRAUDS: 493-498.

STUDENTS:
- domicil of, 85-87.

SUCCESSION:
- to personal property, governed by what law, 293.

SUCCESSION DUTY:
- where payable, 46-53.
- what law governs, 46-53.

TAXES:
- where payable, 46, 47-53.
- domicil for purpose of, 87 et seq.
- situs of property, for purposes of, 97.

TORTS:
- committed in an uncivilized country, 56.
- actions for, when committed abroad, 133, 134, 135, 137-140.
- where suit may be brought, in case of, 498-503.

TRESPASS:
- to real property, where action brought, 149, 150.

UNCIVILIZED COUNTRIES:
- domicil in, 54.
- marriage in, 55.
- contract in, 55.
- alienation of movables in, 56.
- torts in, 56.
- as to procedure, 56-57.

VOTING:
- as evidence of domicil, 22, 86.

WAR:
- conduct of nations, in time of, 17, 18.
- goods captured in, 117-132.

WILLS:
- made in uncivilized countries, 55.

LAW LIBRARY

UC SOUTHERN REGIONAL LIBRARY FACILITY

A 000 683 489 9